(1)
Supreme Court, U.S.
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No. _____
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In The
Supreme Court of the United States

CLIFF GREENE,

Petitioner,

v.

HANOVER DIRECT, INC., et al.; WILLIAM B. WACHTEL, Chairman of the Board of Directors, and Chairman of the Nominating Committee; WAYNE P. GARTEN, Chief Executive Officer, President and Director; STUART FELDMAN, Chairman of the Executive Committee and a member of the Compensation Committee and Director,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Court of Appeals for the Second Circuit affirmed the Judgment of the district court, in a Summary Order dated and filed on June 05, 2009. The Court ruled that "the district court did not abuse its discretion in granting the extension when "the district court granted appellees a brief extension of time to file a motion to dismiss after appellees had difficulty reaching Greene to arrange for a pre-motion conference." Second Circuit, "review a district court's grant of an extension of time pursuant to Federal Rule of Civil Procedure 6(b) for abuse of discretion." "*See Sanozky v. Int'l Ass'n of Machinists & Aerospace Workers*, 415 F. 3d 279, 283-84 (2d Cir. 2005)."

Second Circuit, relied upon the above mentioned case law ("Sanozky"), to support its rulings. "The district court did not abuse its discretion in granting the extension."

Petitioner, researched "Sanozky" and, found Second Circuit rulings, same, as follows: "Fed. R. Civ. P. 6(b) (district court may, in its *284 discretion, grant an extension of time to perform an act *under the rules*").

Respondents' pre-motion conference, submitted to the district court in a memo endorsed letter, dated April 26, 2007, hand delivered to the presiding judge's chambers on April 27, 2007, same, "defendants would like to move the Court for an Order dismissing the

QUESTIONS PRESENTED – Continued

Complaint pursuant to Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 9(b)." "In addition, we respectfully request the Court to extend defendants' time to respond to the Complaint to a date set by the Court at the requested conference."

Petitioner, respectfully asks this Court, whether, respondents' pre-motion conference, submitted to the district court, in a memo endorsed letter dated April 26, 2007, "so ordered" 4-30-07, "defendants may have until May 15, 2007, to answer or otherwise move. No pre-motion conference required.", qualified as being a Rule under 6(b)? IF NOT, then, the Court must conclude, that this is reason for allowance of the writ.

Six Questions are Presented:

1. Whether the district court, committed reversible error and abused its discretion when it extended time to defendants upon a request for same, in a pre-motion conference memo endorsed letter dated April 26, 2007, "so ordered" dated 4-30-07, "defendants may have until May 15, 2007, to answer or otherwise move. No pre-motion conference required." Knowingly, that Rule 6(b)(2), Fed. R. Civ. P. governs extension of time to a tardy litigant who has failed to answer the amended complaint, *prior* to expiration of time period set forth on face of amended summons by the Court.

QUESTIONS PRESENTED – Continued

2. Whether Second Circuit, committed reversible error when it affirmed the district court's extension of time to defendants to perform an act of answering the amended complaint? Knowingly, or should have known, that neither the district court, nor the defendants, were in compliance with Fed. R. Civ. P. 6(b), Rules, that governs the extension of time to tardy litigants, who have failed to answer the amended complaint *prior* to expiration of time period set forth on the face of the amended summons. The applicable rules under Fed. R. Civ. P. 6(b) are 6(b)(1) and 6(b)(2).

3. Whether the district court, committed prejudicial error when it based its final rulings in its memorandum and order dated November 19, 2007, filed November 21, 2007, same, on cause of action *other than, repeat, other than,* the cause of action upon which the amended complaint was brought to the Court, by Plaintiff. Further, knowingly, that in the Court's previous rulings in its memorandum and order dated April 17, 2007, (Re: appraisal rights), the district court ruled that "Pro Se Plaintiff Cliff Greene brought this suit against Hanover Direct, Inc. ('Hanover Direct'), alleging that it 'knowingly and intentionally conspired to manipulate its annual consolidated financial statements, for fiscal years 1998 through 2004,' in a conspiracy to defraud its shareholders and artificially inflate its annual revenues." "*See* amended complaint ¶¶ 6-7."

QUESTIONS PRESENTED – Continued

4. Whether the district court, committed prejudicial error when it breached its promise to take judgment by default for the relief demanded in the complaint, "If defendants failed to answer the complaint within *20* days after service of the summons, exclusive of the day of service." Also, knowingly, that defendants, tardy litigants, have failed to answer the amended complaint prior to expiration of time period set forth on face of amended summons. Further, failed to comply with applicable Rule 6(b) and Rule there under Fed. R. Civ. P. 6(b)(2), Show Cause and Excusable Neglect.

5. Whether the district court committed prejudicial error when it dismissed the amended complaint pursuant to 12(b)(6) Fed. R. Civ. P., Motion, knowingly, that a 12(b)(6) Motion to dismiss may be dismissed *only* where there are *no sets of issues of facts involved*. Further, knowingly, dismissal of the Complaint is proper *only* where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" and, that a 12(b)(6) Motion should have been disposed of as provided for in Rule 56, Fed. R. Civ. P., and all parties should have been given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

6. Whether the district court, committed reversible error when it denied plaintiff 's timely filed application for trial by jury pursuant to Fed. R. Civ. P. 38.

QUESTIONS PRESENTED – Continued

Further, knowingly, that defendants were tardy litigants, who have failed to answer the complaint prior to expiration of time set forth on the face of the summons and, therefore, were required to follow the law. Fed. R. Civ. P. 6(b), and the Rule thereunder, Fed. R. Civ. P. 6(b)(2) Show Cause and Excusable Neglect. The law was not followed by the defendants. Nor, was it followed by the lower courts.

LIST OF PARTIES

The parties below are listed in the caption.

HANOVER DIRECT, INC., et al.; WILLIAM B. WACHTEL, Chairman of the Board of Directors, and Chairman of the Nominating Committee; WAYNE P. GARTEN, Chief Executive Officer, President and Director; STUART FELDMAN, Chairman of the Executive Committee and a member of the Compensation Committee and Director, *Respondents*.

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OPINION BELOW

The Summary Order, Second Circuit, Court of Appeals, appears in Appendix A to this Petition. The Memorandum and Order, United States District Court, filed November 21, 2007, appears in Appendix B. The Memorandum and Order, United States District Court, filed April 17, 2007, appears in Appendix C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Summary Order in this matter was filed on June 5, 2009. Petitioner filed his Notice of Appeal in United States Court, Southern District of New York on December 18, 2007. Second Circuit, April 16, 2009, Notice of Hearing Date, date of hearing: Tuesday June 2, 2009. Time allotted for Oral Argument: 5 minutes per side. See Appendix F. Second Circuit, May 14, 2009, cancelled scheduled Notice of Hearing for June 2, 2009. And, invoked 10 Cal Rule 34(b). Notice of the Court's intent to hear the appeal on submission. See Appendix G.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VII, United States Constitution

Title 28 United States Code Section 1254(1)

Title 28 United States Code Section 2201

Title 5 United States Code Section 552

STATEMENT OF THE CASE

1. On March 13, 2007, Plaintiff filed an amended complaint with the district court's clerk, pro se office. The clerk, issued four (4) summons, same were to be served upon each of the four (4) defendants. After having been served, Plaintiff was required to return the originals with a certificate of service to the clerk's office. On March 14, 2007, defendants were properly served, and, on March 15, 2007, the certificates of service were filed with the clerk's office.

2. The district court, made it crystal clear to the defendants on the face of the summons, what the consequences would be if defendants failed to answer the complaint *prior* to expiration of time period set forth on the face of the summons.

3. At midnight, on April 03, 2007, defendants fell into default. When the court learned that the defendants had not answered the amended complaint prior to expiration of time period set forth on face of summons, the court breached its promise, did an

about face, and, with jet like speed, illegally extended time to defendants to answer or otherwise move. The extension *was illegal* because the defendants nor the court were in compliance with Rule 6(b), Fed. R. Civ. P., and the applicable Rules thereunder, namely, 6(b)(1) and 6(b)(2). Fed. R. Civ. P. 6(b)(1) grants a court discretion to enlarge a time period for cause shown if the request comes before the expiration of the initial period or an extension of that period. *See* App. 48 for affirm.

4. Fed. R. Civ. P. 6(b)(2), permits enlargement, *upon motion*, after the specified period expires. The applicant must show cause and excusable neglect. *See* App. 49 for affirm.

5. Defendants, tardy litigants, that have failed to answer the amended complaint prior to expiration of time period set forth on face of amended summons, were required to petition the court, to file a motion in this case a pre-motion conference, Show Cause and Excusable Neglect, same, pursuant to provisions provided for in Fed. R. Civ. P. 6(b)(2). Instead defendants' pre-motion conference was pursuant to Fed. R. Civ. P. 12(b)(6), and Fed. R. Civ. P. 9(b). *See* App. 23D for affirm.

6. Petitioner, contends that the district court, *abused* its discretion when it extended time to defendants to answer or otherwise move. Knowingly, that defendants, a tardy litigant, that has failed to answer an amended complaint prior to expiration of time period set forth on face of amended summons,

were required to petition the court, to move the court pursuant to Fed. R. Civ. P. 6(b).

7. Defendants, in a memo endorsed letter dated April 26, 2007, hand delivered to the Judge's Chambers on April 27, 2007, requested an extension of time to answer the complaint. The court, on April 30, 2007, "so ordered" that "the defendants may have until May 15, 2007, to answer or otherwise move. No pre-motion conference required."

8. Petitioner, contends that the granted extension of time, mentioned herein above in #6, *was an abuse of discretion* and, a violation of Fed. R. Civ. P. 6(b), and Rule 6(b)(2), thereunder.

9. Petitioner brought the herein captioned case to the district court (S.D.N.Y.) on allegation that alleges defendants engaged in a fraudulent scheme to defraud its shareholders by allegedly, knowingly, and intentionally conspiring to manipulate Hanover Direct, Inc., (HDI), annual consolidated financial statements for personal gains by using unlawful accounting practices and artificially inflating its annual revenues so as to maximize senior managers yearend bonuses for those that held performance contractual agreements, expressed or implied. *See* App. 58 for affirm. Also, *see* App. 58, same, shows how the scheme works.

10. The following application to the court, denied:

-1- Request to vacate memo endorsed order dated 4-30-07. *See* App. 26E for affirm.

-2- Request for Declaratory Judgment pursuant to Rule 57, Fed. R. Civ. P., and 28 U.S.C., Sec. 2201. *See* App. 28F for affirm.

-3- Pre-Motion Conference for default Judgment pursuant to Rule 55(b)(2), Fed. R. Civ. P. *See* App. 35I for affirm.

-4- Trial by Jury, a basic Foundational Constitutional Right. *See* App. 57Q for affirm.

10. Due diligence on the part of Petitioner and the help of New York's U.S. Senior Senator, Charles E. Schumer, through the Freedom of Information Act (FOIA), 5 U.S.C., Sec. 552, on June 8, 2007, received from Securities and Exchange Commission (SEC), twenty-four (24) pages of non-public documents that were substantially supportive of Plaintiff's allegations in the amended complaint, evidence that showed defendants had engaged in criminal activities. *See* App. 67U for affirm.

11. Petitioner, contends that the district court, committed prejudicial error when it failed to include in its final rulings the twenty-four (24) pages of non-public documents with only names, home addresses and phone numbers deleted. Further, knowingly, that SEC's non-public records requires SEC managers of the records, majority vote to be released. And, must be compellingly supportive of subject matter requested therefor.

12. The non-public documents mentioned in above #10, there are evidence that showed at least two (2) of Hanover Direct, Inc., "(HDI)", Senior Managers had allegedly conspired to defraud its shareholders by engaging in criminal accounting practices. -1- Revenues were being recorded prior to shipped goods or merchandise. The revenues were reported on SEC's Form 10-K via Edgar Database to SEC, and to shareholder via U.S. Mail. The customers were phantom and so was the allegedly shipped goods or merchandises.

13. Two top high ranking executives of HDI, terminated for alleged cause, on March 08, 2005, same, arose from the circumstances surrounding the restatement. *See* App. 59R for affirm.

14. Listed herein are documents that are compellingly supportive of Plaintiff's allegations in pars. 6 and 7 of the amended complaint. The cause of action upon which the case was brought to the district court. *See* district court's memorandum and order dated April 17, 2001, at App. 21C for affirm.

20. Petitioner relied upon HDI's annual consolidated financial statements to determine whether to buy, sell, or hold its securities. Petitioner was stunned to learn that the statements were false, artificially inflated for personal gains for the wrongdoers, as a result of these unlawful accounting practices, Petitioner lost a substantial amount of his life savings. HDI's financial statements were required to be restated as far back as 1998. *See* App. 59R for

affirm. Also, *see* SEC INFORMAL INQUIRY App. 59R.

21. The district court, final rulings in its memorandum and order dated November 19, 2007, filed November 21, 2007, same, dismissing Plaintiff's amended complaint, was based on cause of action other that *repeat* other than the cause of action upon which the amended complaint was brought to the court, by Plaintiff. *See* App. 5B for affirm.

22. District Court, Memorandum and Order dated April 17, 2007, (Re: Appraisal Rights); same, the cause of action upon which Plaintiff brought suit to the Court. App. 23. *See* paragraphs 6 and 7, App. 58.

30./7. Plaintiff alleges that defendants engaged in a fraudulent scheme to defraud its shareholders by allegedly, knowingly and intentionally conspired to manipulate Hanover Direct, Inc. ("HDI"), annual consolidated financial statements for personal gains by using unlawful accounting practices and artificially inflating its annual revenues so as to maximize senior managers yearend bonuses who held performance contractual agreements, expressed or implied.

32. Petitioner, filed his Notice of Appeal U.S. district court, S.D.N.Y., on December 18, 2007.

33. Second Circuit, April 16, 2009, Notice of Hearing date, date of hearing: Tuesday June 2, 2009. Time allotted for Oral Argument: 5 minutes per side. *See* App. 30G for affirm.

34. Second Circuit, May 14, 2009, *cancelled* scheduled Notice of Hearing for June 2, 2009, and, invoked local Rule 34(b), Notice of the Court's intent to hear the appeal on submission. *See* App. 33H for affirm.

35. Second Circuit's decision was filed June 5, 2009.

36. Second Circuit's issued as Mandate June 30, 2009.

REASONS FOR ALLOWANCE OF THE WRIT

1. The district court, committed reversible error and abused its discretion when it extended time to defendants upon a request for same, in a pre-motion conference memo endorsed letter dated April 26, 2007, "so ordered," dated 4-30-07, "defendants may have until May 15, 2007, to answer or otherwise move. No pre-motion conference required." Knowingly, that Rule 6(b)(2), Fed. R. Civ. P., governs extension of time to a tardy litigant who has failed to answer the amended complaint *prior* to expiration of time period set forth on face of amended summons by the court.

A. RULE 6(b)(2) PERMITS ENLARGEMENT *UPON MOTION. SEE* CIVIL PROCEDURE RELEASE #9, 12/89. App. 49 and 50.

1. Rule 6(b)(2) permits enlargement, *upon motion*, after the specified period expires. The applicant must

show cause and excusable neglect. The courts passing on Rule 6(b)(2) motions have demonstrated varying attitudes toward failure to act timely. Some courts have been flexible: *United States v. Miller Bros. Constr. Co.*, 505 F. 2d 1031, 1035 (10th Cir. 1974) ("A discretionary extension should be liberally granted absent a showing of bad faith on the part of the movant . . . or undue prejudice to other parties . . . "). Also. *see* case laws *Coady v. Aquadilla Terminal, Inc.*, 456 F. 2d 677, 678-79 (1st Cir. 1972); *Anderson v. Stanco Sports Library, Inc.*, 52 F.R.D. 108, 109-110 (D.S.C. 1971).

B. OTHER COURTS HAVE BEEN LESS DISPOSED TO GRANT RELIEF TO A TARDY LITIGANT. *See* as follows:

1. *Other courts* have been less disposed to grant relief to a tardy litigant: *Supermarkets Gen. Corp. v. Grinnell Corp.*, 490 F. 2d 1183, 1186 (2d Cir. 1974), *aff'd* 59 F.R.D. 512 (S.D.N.Y. 1973). *Graham v. Pennsylvania R.R.*, 342 F. 2d 914, 915-16 (D.C. Cir. 1964), *cert. denied* 381 U.S. 904 (1965). *Driver v. Gindy Mfg. Corp.*, 24 F.R.D. 473, 474-75 (E.D. Pa. 1959).

Regardless of this apparent difference in approach to Rule 6(b)(2), the outcome probably depends most on the type of proceeding not time met.

Excepted from enlargement discretion in Rule 6(b), are the times for taking action under Rules 50(b), 52(b), 59(b), (d) and (e) and 60(b). This

exception is strictly construed. *See,* e.g., *Hulson v. Atchison T. & S.F. Ry.*, 289 F. 2d 726 (7th Cir. 1961), *cert. denied* 368 U.S. 835 (1961). The 1983 Amendment to Rule 6(b)(2) adds two additional Rules that are excepted from enlargement discretion: Rule 50(c) and Rule 74(a).

2. The writ should be allowed on the grounds that the case law upon which Second Circuit relied upon in its affirmation of the district court's extension of time to defendants, ("*Sanozky v. Int'l Ass'n of Machinists & Aerospace Workers*, 415 F.3d 279 (2d Cir. 2005)"), actually supports Petitioners' position; that the district court and the defendants, *were not in compliance with the rules under Fed. R. Civ. P. 6(b)*, namely 6(b)(1) and 6(b)(2).

In "*Sanozky*," Second Circuit ruled as follows: "Fed. R. Civ. P. 6(b) (district court may, in its *284 discretion, grant an extension of time to perform an act under *the rules*"). What are the applicable rules in the herein captioned case? They are Rules 6(b)(1) and 6(b)(2). Did defendants submit their pre-motion conference, under the provisions set forth in Rule 6(b)(2) Show Cause and Excusable Neglect? *The answer is no.* The district court extended time to the defendants to answer the amended complaint, *under grounds other than the provisions provided for under Rule 6(b)(2), Fed. R. Civ. P.* Petitioner contends that the absence of pre-motion conference, by the defendants, pursuant to the provisions provided for in Rule 6(b)(2); the district court, the presiding judge, *does not have legal authority to extend time to defendants* to answer the *amended complaint.*

3. Defendants, a tardy litigant, that has failed to answer the amended complaint prior to expiration of time period set forth on face of amended summons, were required to petition the court, to file a motion, in this case a pre-motion conference, to Show Cause and Excusable Neglect. If the district court, the presiding judge, finds that the Show Cause was a good Show Cause for not answering the amended complaint prior to expiration of time set forth on the face of the amended summons, and, that the excusable neglect was reasonable, absent of bad faith on the part of movant (defendants), or undue prejudice to parties to the action *and most of all, that it was no fault of the defendants, as to why the amended complaint was not answered prior to expiration of time period set forth on face of amended summons.* As it stands, defendants did not file its pre-motion conference pursuant to Rule 6(b)(2), instead, defendants' pre-motion conference was pursuant to Fed. R. Civ. P. 12(b)(6), and Fed. R. Civ. P. 9(b). *See* App. 23D for affirm. "Defendants would like to move the court for an order dismissing the complaint pursuant to Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 9(b)."

4. Defendants' pre-motion conference, submitted to the district court, in a memo endorsed letter dated April 26, 2007, hand delivered to presiding judge's chambers on April 27, 2007, same, also "We respectfully request the court extend defendants' time to respond to the complaint to a date set by the court at the requested conference.

The district court, "so ordered" 4-30-07, "defendants may have until May 15, 2007, to answer or otherwise move. No pre-motion conference required." Petitioner contends that this extension of time was contrary to the provisions provided for in Rule 6(b)(2), Fed. R. Civ. P. Therefore, *an abuse of judicial discretion. See Supermarkets Gen. Corp. v. Grinnell Corp.,* 490 F. 2d 1183, 1186 (2d Cir. 1974), *aff'd* 59 F.R.D. 512, 513-15 (S.D.N.Y. 1973). *Graham v. Pennsylvania R.R.*, 342 F. 2d 914, 915-16 (D.C. Cir. 1964), *cert. denied* 381 U.S. 904 (1965). *Driver v. Gindy Mfg. Corp.*, 24 F.R.D. 473, 474-75 (E.D. Pa. 1959). *See* App. 49 for affirm.

5. *The writ should be allowed, when this Court, apply facts given herein, to the law.*

6. *Further,* as far back as May 11, 2007, eleven (11) days after district court, extended time to defendants, in a "so ordered" dated 4-30-07, Plaintiff filed an application with the court respectfully requesting that the court reconsider its extension of time to defendants to answer the amended complaint. *See* as follows:

> 1. "Request for district court, to reconsider its extension of time to defendants to answer amended complaint on grounds that defendants were not in compliance with Fed. R. Civ. P. 6(b)(2), application denied. *See* App. 26E for affirm.
>
> 2. Fraud upon the court. *See* App. 26E for affirm.

7. *Also, see* request for declaratory judgment pursuant to Fed. R. Civ. P. 57, and 28 U.S.C., Sec. 2201. Same, received in Pro Se Office on May 30, 2007. This too was denied. *See* App. 28F for affirm.

Fraud upon the court, had to do with counsel of record, for defendants, in its pre-motion conference, lied to the court, about why its letter dated 4-17-07 to "Mr. Greene," by overnight courier was not delivered "because of lack of an apartment number." "In addition, we sent a letter to Mr. Greene, by overnight courier to the address given by Mr. Greene, in the complaint, but it was not delivered because of a lack of an apartment number. We then sent another copy of the letter after obtaining Mr. Greene's apartment number. Mr. Greene, finally responded by letter dated April 23, 2007, received by us today, advising us that he refuses to allow defendants additional time to respond to the complaint." *See* App. 24D for affirm.

8. Counsel knew that its overnight letter was delivered to [Home Address Omitted], as opposed to Mr. Greene's address at [Home Address Omitted]. *See* App. 52 for affirm. Yet, counsel lied to the court. That is a reprehensible offense that calls for judicial sanction, a lawyer, a member of the court, perpetrated a fraud upon the court, certainly did call for sanction. However, the court did not sanction counsel. In a letter dated February 28, 2008, received from counsel of record law firm, informed Petitioner, that counsel of record is no longer with the firm. *See* App. 69V for affirm. This lie to the court, showed bad faith at its worst.

9. To conclude number one under reasons for allowance of the writ, Petitioner contends that the illegal extension of time to defendants, by the district court, and the affirmation of same by Second Circuit, resulted in Plaintiff being prejudiced, deprived of the relief sought in the amended complaint. -2- Fed. R. Civ. P., Rule 55(b)(2), (default), and -3- The district court's promise on the face of the amended summons, "An answer to the complaint which is herewith served upon you, within *20* days after service of this summons upon you exclusive of the day of service. *If you fail to do so judgment by default will be taken against you for the relief, demanded in the complaint.*"

2. Second Circuit committed reversible error when it affirmed district court's extension of time to defendants to answer or otherwise move. And, relied upon its own case law rulings in "*Sanozky v. Int'l Ass'n of Machinists & Aerospace Workers*, 415 F. 3d 279, 283-84 (2d Cir. 2005). To support its affirmation. Knowingly, that defendants' request for extension of time, to answer the amended complaint came to the district court, in a pre-motion conference memo endorsed letter dated April 26, 2007, hand delivered to Judge's Chambers on April 27, 2007, and "so ordered" 4-30-07. Further, knowingly, that defendants were tardy litigants, who has failed to answer the amended complaint, *prior to expiration of time period set forth on face of the amended summons. And, that Fed. R. Civ. P. 6(b)(2) governs tardy litigants. That has failed to make timely answer to amended complaint.* Petitioner researched "*Sanozky*" and found

Second Circuit rulings, same, as follows: "Fed. R. Civ. P. 6(b) "district court may, in its *284 discretion, grant an extension of time to perform an act *under the rules.*"

C. "*SANOZKY*" COMPELLINGLY SUPPORTS PETITIONER'S POSITION, AND NOT 2D CIRCUIT'S.

1. Petitioner finds that "*Sanozky,*" compellingly, supports Plaintiff's position. That the defendants failed to seek extension *under the Rules of 6(b), which are Fed. R. Civ. P. 6(b)(1) and 6(b)(2).* Therefore, the writ should be allowed. Petitioner is simply respectfully asking this court to apply the facts given herein above, to the *law. Re: 6(b), and the applicable Rules thereunder, 6(b)(1) and 6(b)(2).*

D. RULE 6(b)(1) GRANTS A COURT DISCRETION TO ENLARGE A TIME PERIOD FOR CAUSE SHOWN IF THE REQUEST COMES BEFORE THE EXPIRATION OF THE INITIAL PERIOD OR AN EXTENSION OF THAT PERIOD.

1. Had defendants sought from Plaintiff a stipulation for an extension of time to answer the amended complaint *prior to expiration of time period set forth on the face of the amended summons, same would have been granted.* However, had Plaintiff refused the request for extension, defendants could have sought

the extension with request for same via affidavit to the district court. *See* App. 48 for affirm.

2. Rule 6(b)(1) grants a court discretion to enlarge a time period *for Cause Shown* if the request comes *before* the expiration of the initial period or extension of that period. *See* App. 48 for affirm. Defendants did not seek from the court, an extension of time to answer the complaint until April 27, 2007. Defendants were properly served on *March 14, 2007.* And at midnight, on *April 03, 2007, fell into default.* Thereafter, was required to comply with the provisions provided for in Rule 6(b)(2) Show Cause and Excusable Neglect. Instead of making its pre-motion conference as provided for in 6(b)(2), defendants pre-motion conference was made in a memo endorsed letter dated April 26, 2007, hand delivered to Judge's Chambers on April 27, 2007. Same, to dismiss the complaint pursuant to 12(b)(6) Fed. R. Civ. P. and 9(b) Fed. R. Civ. P. Defendants said to the court: "We respectfully request the court extend defendants' time to respond to the complaint to a date set by the court at the requested conference." *See* App. 24D for affirm.

3. The Court acquiesced in a "so ordered" dated 4-30-07. "Defendants may have until May 15, 2007, to answer or otherwise move. No pre-motion conference required." *This was without a doubt, an abuse of discretion.* Petitioner contends that Second Circuit committed reversible error when it affirmed district court's extension of time to answer the amended complaint.

4. Plaintiff visited the Court's Clerk Pro Se Office on April 16, 2007, same, to find out whether defendants had answered the amended complaint. The answer was no. Petitioner alleges that the Clerk's Office tipped off defendants that they were in default. Hence, the defendants' letter dated April 17, 2007 seeking stipulation for extension of time to answer the amended complaint. Same, referred to by Second Circuit, in its Summary Judgment, page 2 lines 38-42, as follows: "The district court granted appellees a brief extension of time to file a motion to dismiss after appellees had difficulty reaching Greene to arrange for a pre-motion conference." "The district court did not abuse its discretion in granting the extension." Petitioner contends that as brief as the extension may have been, same, must be granted under the Rules of 6(b) Fed. R. Civ. P. The applicable Rules are 6(b)(1) and 6(b)(2), Fed. R. Civ. P. Therefore, since the brief extension mentioned herein above, was not *repeat* was not under *the rules*, the district court did indeed abuse its discretion in granting the extension. *See Sanozky.*

5. To conclude Number Two under Reasons for Allowance of the Writ, Petitioner respectfully asks this Court whether Respondents' pre-motion conference, submitted to the district court in memo endorsed letter dated April 26, 2007, "so order" 4-30-07, "defendants may have until May 15, 2007, to answer or otherwise move. No pre-motion conference required.", *qualified as being a Rule under 6(b)*? If

not, then *this Court must conclude that this is indeed a compelling reason to allow the writ.*

6. Petitioner, further, concludes that after defendants failed to answer the amended complaint prior to expiration of time set forth on the face of the amended summons, Plaintiff has no say in the matter of granting defendants stipulation extending time to answer the amended complaint. It is left entirely up to the presiding judge and the provisions provided for in Fed. R. Civ. P. 6(b)'s Rule 6(b)(2). The defendants, a tardy litigant, should have filed its pre-motion conference Show Cause and Excusable Neglect, and if the Court finds that the Cause Shown was a good cause, and, the Excusable Neglect, demonstrated good faith by defendants, also, *that there was a reasonable basis for not complying within the specified period set forth on the face of the amended summons, then,* and only then that the district court, the presiding judge, has the legal authority to extend time to defendants to answer the complaint. Plaintiff had no hand in the matter of the extension. So why were defendants trying to reach Plaintiff to arrange for a pre-motion conference? *See* lines #34-42 page 2 of Summary Order filed June 05, 2009. *Petitioner contends that the district court did indeed abused its discretion in granting the extension.* And, the case law that Second Circuit relied upon in its affirmation of the district court's rulings *actually supported Plaintiff, the Petitioner.* In "*Sanozky*" Second Circuit Ruled as follows: "Fed. R. Civ. P. 6(b) (district court

may in its *284 discretion grant an extension of time to perform an act *under the Rules.*"

7. Defendants failed to file its pre-motion conference pursuant to 6(b)'s Rule 6(b)(2), Fed. R. Civ. P. Therefore, should not have been granted extension of time to answer the amended complaint.

CASE LAW THAT SUPPORTS PETITIONER'S POSITION

1. *In re Four Seasons Securities, Laws Litigation*, 493 F. 2d 1288 (C.A. Okl. 1974).
2. *Sieb's Hatcheries, Inc. v. Lindley*, 13 F.R.D. 113 (D.C. Ark. 1952).
3. *Boykin v. Commerce Union Bank of Union City, Tenn.*, 109 F.R.D. 344 (W. D. Tenn. 1986).

1. Review is warranted to resolve a conflict concerning the district court's memorandum and order dated April 17, 2007, and memorandum and order dated November 19, 2007, and filed November 21, 2007. Re: Grounds upon which the case was brought to the Court.

2. Review which of the two memorandum and order the Court should have based its final order, dismissing the case.

3. The district court committed prejudicial error when it based its final rulings in its memorandum and order dated November 19, 2007, filed November

21, 2007, same on cause of action *other than, repeat, other than*, the cause of action upon which the amended complaint was brought to the court, by Plaintiff. Further, knowingly, that in its memorandum and order dated April 17, 2007, (Re: appraisal rights). The district court ruled that "pro se Plaintiff Cliff Greene brought this suit against Hanover Direct, Inc., ("Hanover Direct") alleging that it "knowingly and intentionally conspired to manipulate its annual consolidated financial statements for fiscal years 1998 through 2004," in a conspiracy to defraud its shareholders and artificially inflate its annual revenues." "*See* amended complaint ¶¶ 6-7."

On March 13, 2007, Plaintiff brought to the district court an amended complaint, same, alleging in paragraphs numbers 6-7, both as follows:

A. PARAGRAPH SIX OF AMENDED COMPLAINT

"Plaintiff alleges that HDI knowingly and intentionally conspired to manipulate its annual consolidated financial statements for fiscal years 1998 through 2004, by using unlawful business practices.

B. PARAGRAPH SEVEN OF AMENDED COMPLAINT

"Plaintiff alleges that defendants engaged in a fraudulent scheme to defraud its

shareholders by allegedly, knowingly and intentionally conspired to manipulate Hanover Direct, Inc. ("HDI"), annual consolidated financial statements for personal gains by using unlawful accounting practices and artificially inflating its annual revenues so as to maximize senior managers' yearend bonuses who held performance contractual agreements, expressed or implied.

REASONS FOR ALLOWANCE OF THE WRIT ARE LISTED BELOW IN ORDER OF PRIORITY. SAME, ARE THE TWO (2) MAJOR REASONS FOR ALLOWANCE OF THE WRIT

1. Memorandum and order dated New York, November 19, 2007, date filed November 21, 2007, same, granted defendants' motion to dismiss the complaint in its entirety with prejudice, was not *repeat* was not based on the cause of action upon which the case was brought to the Court by Plaintiff. *See* App. 5B. For pages one (1) and sixteen (16) of herein above mentioned memorandum and order.

2. Memorandum and order dated New York April 17, 2007. *See* pages one (1) and two (2) at App. 21C. Please note that the presiding judge, Naomi Reice Buchwald, said the following in this order: "*See* amended complaint ¶¶ 6-7." Further, please note that both orders are allegedly signed by the same judge.

A. ABUSE OF DISCRETION

1. The district court abused its discretion when it extended time to defendants upon a request for same, in a pre-motion conference memo endorsed letter dated April 26, 2007, "so ordered" dated 4-30-07, "defendants may have until May 15, 2007, to answer or otherwise move. No pre-motion conference required." Knowingly, that Rule 6(b)(2), Fed. R. Civ. P., governs extension of time to a tardy litigant who has failed to answer the amended complaint prior to expiration of time period set forth on face of amended summons by the Court.

2. Defendants, a tardy litigant, that has failed to answer the amended complaint prior to expiration of time period set forth on face of amended summons was required to petition the court, to file a motion in this case, a pre-motion conference. Show Cause and Excusable Neglect. *See* App. 49 for affirm.

3. Defendants' pre-motion conference submitted to the district court in a memo endorsed letter, dated April 26, 2007, hand delivered to the presiding Judge's Chambers on April 27, 2007, same "defendants would like to move the court for an order dismissing the complaint pursuant to Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 9(b)." In addition, we respectfully request the court extend defendants' time to respond to the complaint to a date set by the court at the requested conference."

4. Petitioner contends that defendants' pre-motion conference should have been pursuant to the

provisions provided for in Fed. R. Civ. P. 6(b)(2), as opposed to 12(b)(6) and 9(b) Fed. R. Civ. P., listed in the above #3. Therefore the district court did indeed abuse its discretion under 6(b) Rule, 6(b)(2), Fed. R. Civ. P. Further, Second Circuit's affirmance of the district court's extension of time to defendants to answer or otherwise move and its reliance upon Second Circuit's case law, *Sanozky v. Int'l Ass'n of Machinists & Aerospace Workers*, 415 F. 3d 279, 283-84 (2d Cir. 2005). Actually, supports Petitioner's position and not that of Respondents', nor the district court.

5. Petitioner researched "*Sanozky*" and found Second Circuit's rulings, same, as follows: "Fed. R. Civ. P. 6(b) "district court may in its *284 discretion grant an extension of time to perform an act under *the Rules*. Fed. R. Civ. P. 12(b)(6), and Fed. R. Civ. P. 9(b) are *not* rules under 6(b), Fed. R. Civ. P.

6. The applicable rules under 6(b), in the herein captioned case are 6(b)(1) and 6(b)(2), Fed. R. Civ. P., since, defendants were not in compliance with either; the extension should not have been granted. And, neither should there have been an affirmation of same by Second Circuit.

7. "*Sanozky*" favors Petitioner, and not the district court, nor defendants. The district court failed to interpret and apply the law impartially. The district court should have rejected defendants' pre-motion conference to dismiss pursuant to 12(b)(6) and 9(b), Fed. R. Civ. P., and instead directed defendants to

comply with 6(b) Fed. R. Civ. P. The court chose instead to abuse its discretion by extending time to defendants on grounds other than those provided for in Rule 6(b)(2) Fed. R. Civ. P. Hence, Reasons for Allowance of the Writ.

B. LOCAL RULE 34(b). ORAL ARGUMENT

1. Petitioner respectfully requests that this Court take a special interest in the actions taken by Second Circuit's Office of the Clerk, in its changing *repeat* changing the rulings of the Judge that presided over the three-judge panel. Same, set the date, time, and the allotted time for oral argument. *See* App. 30 for notice of hearing date and affirm, of same.

2. In light of the fact that the Clerk's Office misinterpreted Second Circuit's rulings in "*Sanozky v. Int'l Ass'n of Machinists & Aerospace Workers*" in its affirmation of the district court's abuse of discretion, this Court should take a good look at the Clerk's Office conduct in its cancellation of oral argument pursuant to Local Rule 34, cancelling oral argument one (1) month after the judge scheduled to preside over the panel set the date and time for same, is questionable.

3. Further, please note that the judge scheduled to preside over the three-judge panel did not invoke #(3) under the FRAP 34(b), oral argument. Therefore, the Clerk of the Court does not have the legal authority to overrule the judge. This is Reasons for Allowance of the Writ, and, sanction of the Clerk's Office.

C. LOCAL RULE 34. ORAL ARGUMENT

*(a) **Number of Counsel.*** Only one counsel will be heard for each party on the argument of a case, except by leave of the court.

*(b) **Time Allotments.*** The judge scheduled to preside over the panel will set the time allowed for argument by each party after considering the appellant's brief and each, party's request for argument time. Normally, ten or fifteen minutes will be allotted to each side. Parties on the same side of an appeal may be obliged to divide the time allotted to their side. Arguments in pro se appeals are normally five minutes per side. The clerk will notify counsel and pro se parties of all such time allotments.

D. FRAP 34. ORAL ARGUMENT

(a) **In General; Local Rule.** Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall pro-vide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral argument will be allowed unless

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

(b) Notice of Argument; Postponement. The clerk shall advise all parties whether oral argument is to be heard, and if so, of the time and place therefor, and the time to be allowed each side. A request for postponement of the argument or for allowance of additional time must be made by motion filed reasonably in advance of the date fixed for hearing.

[Amended April 30, 1979, effective August 1, 1979; March 10, 1986, effective July 1, 1986; April 30, 1991, effective December 1, 1991; April 22, 1993, effective December 1, 1993.]

E. LOCAL RULE 34 AND FRAP 34 ORAL ARGUMENT CONCLUSION

1. To conclude Local Rule 34. Oral Argument and FRAP 34. Oral Argument, Petitioner finds that the actions taken by the Office of the Clerk in this matter is questionable, and Reasons for the Allowance of the Writ.

F. NOTICE OF HEARING DATE, DATE OF HEARING, TUESDAY, JUNE 2, 2009, TIME ALLOTED FOR ORAL ARGUMENT – 5 MINUTES PER SIDE

1. The three judges on the panel were unanimously of the opinion that there would be oral argument, and according to FRAP 34. Oral Argument (b), Petitioner was advised that there would be oral argument. *See* App. 30G for affirm.

2. The Office of the Clerk, one month after the case was set for oral argument, decided to reach over to FRAP 34. Oral Argument and used #(3), "The facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument." This too is questionable and Reasons for Allowance of the Writ.

PREJUDICIAL ERROR

Error substantially affecting appellant's legal rights and obligations. *Erskine v. Upham*, 56 Cal. App. 2d 235, 132 P. 2d 219, 228 (1942); *Trepanier v. Standard Min. & Mill. Co.*, 58 Wyo. 18, 123 P. 2d 378, 380 (1942).

Such may be grounds for new trial and reversal of judgment Fed. R. Civ. P. 59. A prejudicial error is one which affects or presumptively affects the final results of the trial. *State v. Gilcrist*, 15 Wash. App. 893, 552 P. 2d 690, 693 (1976). *See* also error; plain error rule.

4. The district court committed prejudicial error when it breached its promise to take judgment by default for the relief demanded in the complaint, "if defendants failed to answer the complaint within *20* days after the service of the summons, exclusive of the day of service." Also, knowingly, that defendants, a tardy litigant, that has failed to answer the amended complaint prior to expiration of time period set forth on face of amended summons. Further, failed to comply with applicable Rule 6(b) and Rule thereunder Fed. R. Civ. P. 6(b)(2) Show Cause and Excusable Neglect.

A. BREACH OF PROMISE A BREAKING OF A PROMISE AN ORAL OR WRITTEN AGREEMENT TO DO OR NOT TO DO SOMETHING

1. "You are hereby summoned and required to serve upon Plaintiff's attorney (name and address) Pro Se Cliff Greene, [Home Address Omitted]." "An answer to the complaint which is herewith served upon you within *20* days after service of this summons upon you exclusive of the day of service. *If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.*"

5. The district court committed prejudicial error when it dismissed the amended complaint to 12(b)(6), Fed. R. Civ. P., motion knowingly, that a 12(b)(6) motion to dismiss may be dismissed *only* where there are *no sets of issues of facts involved.* Further,

knowingly, dismissal of the complaint is proper *only* where "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief" and that a 12(b)(6) motion should have been deposed of as provided for in Rule 56, Fed. R. Civ. P. and all parties should have been given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. *See Allen v. Westpoint-Pepperell, Inc.*, 945 F. 2d 40, 44 (2d Cir. 1990).

The district court granted defendants' 12(b)(6) motion knowingly that -1- it is a fact that defendants failed to answer the amended complaint *prior* to the expiration of the specified time period set forth on the face of the amended summons. -2- knowingly, that it is a fact that the district court, unmistakably, illegally, extended time to defendants to answer or otherwise move on grounds that are contrary to Federal law, Rule 6(b)(2), Fed. R. Civ. P., that governs extension of time to a tardy litigant.

B. 12(b)(6), Fed. R. Civ. P.

1. In ruling on a motion to dismiss a court must construe in Plaintiff's favor – any well-pleaded factual allegations in the complaint. *See Allen v. Westpoint-Pepperell, Inc.*, 945 F. 2d 40, 44 (2d Cir. 1990). Consideration is limited to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference and to matters of which judicial notice may

be taken. *See Kramer v. Time Warner, Inc.*, 937 F. 2d 767, 773 (2d Cir. 1991).

C. 12(b)(6), Fed. R. Civ. P.

1. Dismissal of the complaint is proper *only* where it appears beyond a doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Allen v. Westpoint-Pepperell, Inc.*, 945 F. 2d at 44. A 12(b)(6) motion to dismiss may be dismissed *only* where there are *no* sets of issues of facts involved.

D. STATEMENT OF FACTS

1. Petitioner presents to the Court twelve (12) statements of facts same, – presented to Second Circuit in Plaintiff-Appellant's brief and appendix, received 2008, Feb. 11, A.M. 10:05, Clerk's Office U.S. Court of Appeals.

2. The herein above mentioned 12(b)(6) motion granted by the district court, and, the above mentioned, submitted twelve (12) statement of facts are as follows:

STATEMENT OF FACTS

1. IT IS A FACT THAT DEFENDANTS FAILED TO ANSWER THE AMENDED COMPLAINT PRIOR TO THE EXPIRATION OF THE

SPECIFIED TIME PERIOD SET-FORTH ON THE FRONT OF THE AMENDED SUMMONS.

2. *IT IS A FACT THAT DEFENDANTS FELL INTO DEFAULT AT MID-NIGHT ON APRIL 03, 2007.*

3. IT IS A FACT THAT PLAINTIFF PURSUANT TO PARAGRAPH 2(a), OF JUDGE BUCHWALD'S INDIVIDUAL PRACTICES ON APRIL 24, 2007, FILED WITH THE COURTS' PRO SE OFFICE -1- PRE-MOTION CONFERENCE -2- BASIS FOR THE ANTICIPATED MOTION FOR DEFAULT JUDGMENT PURSUANT TO RULE 55. DEFAULT (b)(2), FED. R. CIV. P.

4. IT IS A FACT THAT ON APRIL 27, 2007, THREE (3) DAYS AFTER REPEAT AFTER PLAINTIFF FILED ITS PRE-MOTION CONFERENCE, DEFENDANTS HAND DELIVERED A MEMO ENDORSED LETTER DATED APRIL 26, 2007, THAT CONTAINED ITS PRE-MOTION CONFERENCE TO DISCUSS DEFENDANTS' CONTEMPLATED MOTION TO DISMISS, AND, TO REQUEST EXTENSION OF TIME TO RESPOND TO THE COMPLAINT.

5. IT IS A FACT THAT THE DISTRICT COURT, THREE DAYS AFTER DEFENDANTS' FILINGS (4-30-07), PUSHED PLAINTIFF'S PRE-MOTION CONFERENCE ASIDE, AND, SHOWED PREFERENTIAL TREATMENT TO DEFENDANTS, IN A "SO ORDERED" DATED 4-30-07, "DEFENDANTS MAY HAVE UNTIL MAY 15, 2007 TO ANSWER OR OTHERWISE MOVE. NO PRE-MOTION CONFERENCE REQUIRED."

6. IT IS A FACT THAT THE DISTRICT COURT, GRANTED THE EXTENSION OF TIME TO DEFENDANTS ON GROUNDS THAT ARE CONTRARY TO FEDERAL LAW, RULE 6(b)(2), FED. R. CIV. P., THAT GOVERNS EXTENSION OF TIME TO TARDY LITIGANTS WHO HAVE FAILED TO ANSWER COMPLAINT PRIOR TO EXPIRATION OF TIME PERIOD SET FORTH ON FRONT OF SUMMONS.

7. IT IS A FACT THAT DEFENDANT HANOVER DIRECT, INC. (HDI), MISLED PLAINTIFF TO BELIEVE THAT THE COMPANY WAS MORE PROSPEROUS THAN IT REALLY WAS. FURTHER, IT IS A FACT THAT THE REVENUES REPORTED IN HDI'S ANNUAL CONSOLIDATED FINANCIAL STATEMENTS *WERE FALSE*. SAME, RESULTED IN SUBSTANTIAL FINANCIAL LOSSES TO PLAINTIFF.

8. IT IS A FACT THAT PLAINTIFF RELIED UPON HDI'S FINANCIAL STATEMENTS TO DETERMINE WHETHER TO BUY, SELL OR HOLD ITS SECURITIES.

9. IT IS A FACT THAT AN ACTION THAT BEGINS ILLEGALLY, MUST ALSO END ILLEGALLY. FURTHER, IT IS A FACT THAT THE DISTRICT COURTS' EXTENSION OF TIME TO DEFENDANTS ON GROUNDS OTHER THAN THOSE PROVIDED FOR IN RULE 6(b)(2), FED. R. CIV. P., ARE UNMISTAKABLY ILLEGAL.

10. IT IS A FACT THAT THE DISTRICT COURT, VIOLATED RULE 56, FED. R. CIV. P., WHEN IT EXCLUDED SEC RECORDS FROM ITS RULINGS. KNOWINGLY, THAT THESE RECORDS

WERE COMPELLINGLY SUPPORTIVE OF PLAINTIFF'S AMENDED COMPLAINT.

11. IT IS A FACT THAT PLAINTIFF FILED WITH THE DISTRICT COURT, A NOTICE OF MOTION, SAME, DATED JUNE 29, 2007, CERTIFICATE OF MAILING AND CERTIFIED MAIL-RETURNED RECEIPT. THE COURT EXCLUDED THE NOTICE OF MOTION FROM ITS RULINGS. FURTHER, THE COURT FAILED TO LIST SAME ON THE DOCKET SHEET. *SEE* App. 70W-72.

12. IT IS A FACT THAT THE DISTRICT COURT, COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO ADDRESS DEFENDANTS' ALLEGATION THAT PLAINTIFF'S CAUSE OF ACTION WAS TIME-BARRED. *SEE* II, PAGE #7 OF MEMORANDUM AND ORDER, FILED 11-21-07. IT IS A FACT THAT PLAINTIFF'S CAUSE OF ACTION *WAS NOT* TIME-BARRED. *SEE* PAGE 3 OF MEMORANDUM AND ORDER, 2d PAR. RE: ON AUGUST 10, 2004, THAT IS THE DATE THE COUNT-DOWN BEGINS THE THREE YEARS STATUTE OF LIMITATION ON FED. R. CIV. P. RULE 10(b)(5) CLAIM. PLAINTIFF FILED THE ORIGINAL COMPLAINT ON NOV. 17, 2006, AND, THE AMENDED COMPLAINT ON MARCH 13, 2007. IF PLAINTIFF-APPELLANT'S MATH IS CORRECT, IT DOES NOT ADD UP TO THREE (3), YEARS. HENCE, THE PREJUDICIAL ERROR FOR NOT ADDRESSING THE STATUTE OF LIMITATION SUBJECT MATTER. FURTHER, *IT IS A FACT THAT PLAINTIFF'S CAUSE OF ACTION WAS NOT BROUGHT TO THE*

DISTRICT COURT AS STATED ON PAGE ONE OF THE COURT'S MEMORANDUM AND ORDER. SEE PARS. #6 AND #7 OF THE AMENDED COMPLAINT AND A COURT'S PREVIOUS MEMORANDUM AND ORDER, DATED APRIL 17, 2007, RE: APPRAISAL RIGHTS, *FOR THE CORRECT CAUSE OF ACTION UPON WHICH THE CASE WAS BROUGHT TO THE COURT. SEE* APPENDIX. FOR AFFIRM. ANOTHER PREJUDICIAL ERROR, OR, WAS IT WILL-FULL?

A. SECURITIES AND EXCHANGE COMMISSION NON-PUBLIC DOCUMENTS, TWENTY FOUR, PUSHED ASIDE AND EXCLUDED FROM LOWER COURT'S RULINGS.

A.1. Securities and Exchange Commission (SEC) non-public documents, compellingly supportive of Plaintiff's cause of action listed in pars. 6 and 7, of the amended complaint, were pushed aside and excluded from the lower court's rulings. Petitioner contends that these are Reasons for Allowance of the Writ.

B.1. SEC's non-public documents with only names, home addresses and phone numbers deleted, knowingly, that SEC's non-public documents requires SEC's managers of these documents majority vote to be released, and, must be compellingly supportive of subject matter requested therefor.

C.1. Paragraphs 6 and 7 of the amended complaint were sent to New York's United States Senior Senator Charles E. Schumer. Same, in a letter dated January

24, 2007, seeking his help in acquiring from SEC via Freedom of Information Act (FOIA), 5 U.S.C. Sec. 552; documents that would be supportive of Plaintiff's allegations made in pars. 6 and 7, of the amended complaint. The Senator's response was immediate, expeditiously and effectively, put into action, with a letter to Jane Cobb, director of legislative affairs SEC, 450 Fifth Street, N.W. Washington, DC 20549. Same, included herein above mentioned, pars. 6 and 7. *See* The Following Appendix in reference to Senator Schumer; and his dedicated and efficient staff has been able to be accomplished on behalf of Petitioner.

D.1. Further, all of the following SEC non-public documents were pushed aside and excluded from lower court's rulings. (District court and 2d Cir.), along with the cause of action listed in pars. 6 and 7, of the amended complaint. Also, please note that the district court's Memorandum and Order dated April 17, 2007, at App. 21C affirms; pars. 6 and 7, of the amended complaint. Yet, the court's final rulings dismissing the complaint was based on a completely different cause of action. *See* Court's Memorandum and Order at App. 21C for affirm. These too are Reasons for Allowance of the Writ.

B. THE FOLLOWING APPENDIX FOR AFFIRMATION OF THE HEREIN ABOVE PARS. A, B, C, AND D.

1. Appendix 39J

   Charles E. Schumer, United States Senate, letter dated March 6, 2007, addressed to Jane Cobb, Director of Legislative Affairs Securities and Exchange Commission, 450 Fifth Street, N.W. Washington, DC 20549.

2. Appendix 40

   Warren E. Jackson, FOIA/Privacy Act Research Specialist, Office of Filings and Information Services. Station Place, 100 F Street, N.E. Washington, DC 20549. Letter dated March 8, 2007, addressed to Cliff Greene.

3. Appendix 42K

   Celia Winter, FOIA/Privacy Act Officer, letter dated March 12, 2007, addressed to the Honorable Charles E. Schumer, United States Senate, 757 Third Avenue, Suite 17-02, New York, N.Y. 10017.

4. Appendix 44L

   Brenda L. Fuller, FOIA/Privacy Act Branch Chief, Office of Freedom of Information and Privacy Act. Operations SEC Station Place, 100 F Street, N.E., Washington, DC 20549, letter dated May 31, 2007, addressed to Cliff Greene.

6. The district court committed reversible error when it denied Plaintiff's timely filed application for trial by jury pursuant to Fed. R. Civ. P. 38. Further, knowingly, that defendants were tardy litigants, that have failed to answer the complaint prior to expiration of time set forth on the face of the summons. And, therefore, were required to follow the law. Fed. R. Civ. P. 6(b), and the Rule thereunder, Fed. R. Civ. P. 6(b)(2). Show Cause and Excusable Neglect. The law was not followed by the defendants. Nor was it followed by the lower courts. *See* par. (1), Reasons for Allowance of the Writ and, also, *see* par. (2) of Same of Affirmation.

CONSTITUTION OF THE UNITED STATES

ARTICLE VII.

Right of Trial by Jury

A. IN SUITS AT COMMON LAW, WHERE THE VALUE IN CONTROVERSY SHALL EXCEED TWENTY DOLLARS, THE RIGHT OF TRIAL BY JURY SHALL BE PRESERVED.

A.1. On March 13, 2007, Petitioner, filed an "amended" complaint in the above mentioned captioned case. Same received in pro se office on March 13, 2007. The amended complaint demanded trial by jury on face of the complaint. Also, on the civil cover sheet dated November 17, 2006.

A.2. The demand for trial by jury pursuant to Fed. R. Civ. P. 38, against Hanover Direct, Inc., et al.,

based on allegations listed in paragraphs 6 and 7, of the amended complaint. Petitioner, contended that the grounds upon which defendants were granted extension of time after expiration of time set forth on face of amended summons, were contrary to 6(b), Fed. R. Civ. P. Rule 6(b)(2), that governs extension of time for tardy litigants.

A.3. The district court, denied Plaintiff's demand for trial by jury. *See* App. 1f for Plaintiff's demand trial by jury and attached thereto, exhibits -A- and -B-.

B. CONSTITUTION AND RULE OF LAW

B.1. Petitioner, as a young WWII Army Officer, put life on line to protect and defend the Constitution and the rule of law. Now sixty-five (65) years later, finds himself, victimized by both, in the lower courts.

B.2. Petitioner, a senior citizen 89 [Date Of Birth Omitted], a WWII retired army captain, company commander, Combat Zone, New Guinea campaign. Under the command of General Douglas MacArthur, South West Pacific commander. Became physically disabled. Retired at age 26, in 1946, with 2/3 captain's pay.

B.3. Petitioner, is very proud of his contributions to his country. However, he is not proud of being denied a basic fundamental constitutional right. "Right of Trial by Jury." This is Reason for Allowance of the Writ.

C. THE RULE OF LAW

C.1. In this great country of ours, we are governed by the rule of law. However, to benefit from the rule of law, you must first follow the law. The district court, and defendants, failed to follow the law, Fed. R. Civ. P. 6(b), and the Rule thereunder, 6(b)(2), requires a tardy litigant, to petition the court, to move the court, in this case, a pre-motion conference, pursuant to provisions provided for in Rule 6(b)(2), Show Cause and Excusable Neglect. Instead, defendant's pre-motion conference, in a memo endorsed letter dated April 26, 2007, hand delivered to judge's chambers on April 27, 2007, "defendants would like to move the court for an order dismissing the complaint pursuant to Fed. R. Civ. 12(b)(6), and Fed. R. Civ. P. 9(b)." We respectfully request the court extend defendant's time to respond to the complaint to a date set by the court at the requested conference." *See* App. 23D for affirm.

D. "SO ORDERED" 4-30-07

D.1. "Defendants may have until May 15, 2007, to answer or otherwise move. No pre-motion conference required."

D.2. Petitioner contends that the granted extension to defendants violated Fed. R. Civ. P. 6(b) and its Rule thereunder 6(b)(2). Further, it was an abuse of discretion by the district court.

E. BENEFITTED FROM RULE OF LAW, BUT FAILED TO FOLLOW SAME.

E.1. Petitioner concludes "Right of Trial by Jury" by contending that the defendants, benefitted from the rule of law. However, failed to follow the law. This is a travesty of justice, rendered by the lower courts. And, are Reasons for Allowance of the Writ.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

CLIFF GREENE, pro se
1333 President Street
Brooklyn, New York 11213
(718) 493-7028

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

(Filed Jun. 5, 2009)

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of

New York, on the 5th day of June, two thousand nine.

PRESENT: **HON. DENNIS JACOBS,**
Chief Judge,
HON. AMALYA L. KEARSE,
HON. ROBERT D. SACK,
Circuit Judges.

Cliff Greene,

Plaintiff-Appellant,

-v.-

07-5711-cv

Hanover Direct Inc., 1500 Harbor Boulevard, Wayne P. Garten, President and Chief Executive Officer, Stuart Feldman, Chairman of the Executive Committee, and a Member of the Compensation Committee and Director, William B. Wachtel, Chairman of the Board of Directors, and Chairman of the Nominating Committee,

Defendants-Appellees.

FOR PLAINTIFF-APPELLANT:

Cliff Greene, *pro se*, Brooklyn, New York.

FOR DEFENDANTS-APPELLEES:

Lawrence J. Reina, Reed Smith LLP, New York, New York.

Appeal from the United States District Court for the Southern District of New York (Buchwald, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED.**

Cliff Greene appeals *pro se* from an order of the United States District Court for the Southern District of New York granting Defendants-Appellees' motion to dismiss the complaint, which alleges: violations of Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5; civil claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*; state law claims for fraud, breach of fiduciary duty, and misrepresentation; and an equal protection violation. Greene argues that the district court erred in granting Appellees' motion for an extension of time to file a response and in dismissing the complaint. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

We review a district court's grant of an extension of time pursuant to Federal Rule of Civil Procedure 6(b) for abuse of discretion. *See Sanozky v. Int'l Ass'n of Machinists & Aerospace Workers,* 415 F.3d 279, 283-84 (2d Cir. 2005). The district court granted Appellees a brief extension of time to file a motion to dismiss after Appellees had difficulty reaching Greene to arrange for a pre-motion conference. The

district court did not abuse its discretion in granting the extension.

As to the dismissal of the complaint, we have considered all of Greene's arguments and concluded that they are without merit. We affirm for substantially the reasons stated by the district court in its thorough and well-reasoned decision.

For the foregoing reasons, the judgment of the district court is **AFFIRMED.**

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By /s/ Richard Alcantara
Richard Alcantara,
Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

CLIFF GREENE,

Plaintiff.

- against -

HANOVER DIRECT INC., ET AL.,

Defendants.

---------- X

MEMORANDUM AND ORDER

(Filed Nov. 21, 2007)

06 Civ. 13308 (NRB)

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Pro se plaintiff-shareholder Cliff Greene ("Greene" or "plaintiff") brought this action pursuant to § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, the federal RICO statute, 18 U.S.C. § 1962, the Delaware Securities Act, the United States Constitution, and the common law of New York, against Hanover Direct, Inc. ("HDI"), William Wachtel ("Wachtel"), Wayne P. Garten ("Garten"), and Stuart Feldman ("Feldman," and collectively "defendants") alleging federal securities fraud, civil RICO, violations of § 7323 of the Delaware Securities Act and the Equal Protection Clause, and common law fraud, negligent misrepresentation, and breach of fiduciary duty. Defendants moved to dismiss the complaint in its

entirety. For the reasons discussed below, their motion is granted.

BACKGROUND

HDI, a Delaware corporation publicly traded on the American Stock Exchange ("AMEX" or "Exchange"), manufactured and marketed brand merchandise through its portfolio of catalogs and websites, various retail outlets, and third-party specialty stores. Plaintiff Greene purchased HDI stock over the course of a four year period beginning on April 14, 2000 and ending on June 23, 2004. The amended complaint alleges that HDI artificially inflated the revenue data reported in its consolidated financial statements for fiscal years 1998 through 2004 and that Greene sustained substantial investment losses when these misrepresentations were eventually disclosed in HDI's filings with the Securities and Exchange Commission ("SEC"). HDI is also alleged to have discriminated against Greene by not timely providing him with copies of the corrected financial statements even though other "similarly situated" shareholders received these statements from HDI soon after they were made publicly available. Greene's allegations more or less track the history of HDI's demise, which we recount below drawing from the pleadings as well as HDI's Form 8-K filings with the SEC.

HDI's Financial Accounting Errors

AMEX notified HDI on May 21, 2004 of HDI's failure to meet continued listing standards governing the financial condition and operating results of an Exchange-traded corporation. Rather than challenge AMEX's determination as to its financial health, HDI submitted a strategic management plan detailing the actions it had taken, or would take, to meet the standards in the near-term. By doing so, HDI hoped to avoid the penalties for noncompliance with the AMEX standards, which included formal suspension of trading activity or complete delisting of the security. AMEX was persuaded by HDI's submission and granted HDI until November 21, 2005 to demonstrate the requisite financial performance.

On August 10, 2004, HDI notified its shareholders of a revenue booking error in its annual and quarterly financial reports that resulted in revenue being recorded in advance of the actual shipment of merchandise to customers. Shortly thereafter, HDI issued revised financial statements correcting the error for all fiscal periods dating back to the 2000 fiscal year. HDI identified a second accounting irregularity in its financial statements on November 10, 2004, this time pertaining to the treatment of discount obligations owed to members of HDI's buyer's club programs and affecting the accuracy of its reported revenues as early as 1998. Though the SEC immediately granted HDI a five-day extension of the deadline to file its upcoming September 25, 2004 quarterly report, HDI soon reported that revisions to

the calculated revenue data would require the input of independent, outside counsel following an internal investigation of all accounting-related matters, a process that could not be completed within the five-day extension period and would eventually take over one year.

HDI's inability to file an accurate September 25, 2004 quarterly report violated a second set of AMEX continued listing standards requiring issuers to timely submit their financial statements to the Exchange. Given HDI's preexisting and ongoing violation of the financial performance standards, AMEX immediately halted trading in HDI common stock and, two months later, petitioned the SEC to delist HDI from the Exchange. Trading in HDI common stock was formally suspended on February 2, 2005. The SEC approved AMEX's application to strike HDI's registration on February 15, 2005, and thereafter, HDI continued to trade over-the-counter on the Pink Sheets, an electronic quotation system that publishes bid and ask quotation prices from brokers who buy and sell OTC securities.

In its February 4, 2005 press release and 8-K filing, HDI announced that the SEC had initiated an informal inquiry into its financial reporting starting in 1998. The SEC letter to HDI explicitly noted that the informal inquiry was not to be construed as an indication of a violation of federal securities laws. Over the course of the next two years, SEC officials periodically reviewed HDI's financial statements and offered their comments and revisions but the inquiry

never ripened into a formal investigation. On February 21, 2006, HDI filed all past due financial reports and concurrently announced its preliminary financial results for the fourth quarter and fiscal year 2005.

HDI's Failure to Provide Greene With the Restated Reports

The vast majority of Greene's shares were issued in "street name," i.e., held by his brokerage firm in its own name or that of another nominee but recognizing Greene as the beneficial owner of the shares. After transferring the shares out of street name and into his own name on February 24, 2005, Greene stopped receiving any shareholder correspondence or financial statements from HDI. Most relevant for our purposes, Greene was not mailed copies of HDI's restated financial reports for fiscal years 1999 through 2004 and the annual report for 2005, which were publicly available on February 21, 2006.

Greene wrote to HDI on May 19, 2006 requesting an explanation for the failure to provide him with HDI's financial statements but received no immediate reply. After alerting the SEC to HDI's failure to respond, Greene received an undated letter from HDI on October 21, 2006 apologizing for the lack of a responsive communication and indicating that both the annual report for 2005 and quarterly report for the second quarter of 2006 were enclosed for Greene's review. The letter also directed Greene to all of HDI's

publicly available SEC filings on the EDGAR database located at http://www.sec.gov. Greene alleges that the two reports mentioned in the October 21, 2006 letter were not, in fact, enclosed with that letter. Once again, Greene sought the SEC's intervention in obtaining HDI's financial statements and was informed by agency officials that HDI had been made aware of his situation and would be mailing him copies of its most recent filings. Though Greene eventually received a copy of HDI's 2005 annual report on November 16, 2006, he claims that HDI has yet to provide him with the corrected 2004 annual report.

DISCUSSION

I. Legal Standard

In considering the defendants' 12(b)(6) motion to dismiss, we accept as true the facts alleged in the amended complaint, *Bolt Elec., Inc. v. City of New York*, 53 F.3d 465, 469 (2d Cir. 1995), and draw all reasonable inferences in favor of Greene. *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 216 (2d Cir. 2004). Though the amended complaint "does not need detailed factual allegations" to survive a motion to dismiss, a "formulaic recitation of the elements of a cause of action" cannot suffice. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007). At a minimum, Greene must sufficiently plead the facts underlying the claims "to raise the right to relief above the speculative level on the assumption that all

the allegations in the complaint are true." *Id.* For purposes of a 12(b)(6) motion, the amended complaint "is deemed to include any written instrument attached to it as an exhibit," "statement or document incorporated by reference," and other document that is fairly "integral" to the allegations. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002).

II. Section 10(b) and Rule 10b-5 Securities Fraud

In order to state a cause of action under section 10(b) and Rule 10b-5, "a plaintiff must plead that in connection with the purchase or sale of securities, the defendant, acting with scienter, made a false material representation or omitted to disclose material information and that plaintiff's reliance on defendant's action caused plaintiff injury." *Chill v. General Elec. Co.*, 101 F.3d 263, 267 (2d Cir. 1996). The factual allegations in support of a securities fraud claim must satisfy the heightened pleading requirements of Fed. R. Civ. P. 9(b) and the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(b). *ATSI Comm'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007).

The defendants' motion to dismiss challenges the sufficiency of the plaintiff's allegations as to each element of the 10b-5 claim and further asserts that the three-year statute of limitations on such a claim has run. We need not address whether Greene's cause of action is time-barred or whether he has properly

alleged fraud in connection with the purchase or sale of a security, identified any specific misrepresentations or omissions, or established loss causation because the amended complaint does not plead scienter with the requisite degree of particularity.

A. Greene's Allegations of Scienter Cannot Support His 10b-5 Claim.

The element of scienter requires a showing of "intent to deceive, manipulate, or defraud, . . . or reckless conduct." *ATSI Comm'ns, Inc.*, 493 F.3d at 99. The Second Circuit has held that scienter may be alleged by setting forth (1) facts demonstrating that the defendants had both motive and opportunity to commit the subject fraud; or (2) strong circumstantial evidence of conscious misbehavior or recklessness. *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 168-69 (2d Cir. 2000). However, bare allegations of scienter are insufficient; plaintiffs are required to "state with particularity facts giving rise to a strong inference" that the defendants acted with the requisite intent. *Id.* § 78u-4(b)(2). "[I]n determining whether the pleaded facts give rise to a 'strong' inference of scienter, the court must take into account plausible opposing inferences" and find that a "reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499, 2510 168 L.Ed.2d 179 (2007).

With respect to the motive-and-opportunity prong of scienter, the defendants' opportunity to commit fraud cannot be seriously contested. Therefore, the critical issue is motive: whether Greene has alleged "concrete benefits that could be realized by one or more of the false statements and wrongful disclosures." *Rothman v. Gregor,* 220 F.3d 81, 93 (2d Cir. 2000). Notably, the alleged motive must be sufficiently particularized and personal to the defendants – generalized motives which could be imputed to any publicly-owned company or its managers do not warrant an inference of scienter. *See Rombach v. Chang,* 355 F.3d 164, 177 (2d Cir. 2004); *Chill v. General Electric Co.,* 101 F.3d 263, 268 (2d Cir. 1996); *Acito v. IMCERA Group, Inc.,* 47 F.3d 47, 54 (2d Cir. 1995).

Where the securities fraud claim is predicated upon recklessness or conscious misbehavior, the plaintiff must allege that the defendants had knowledge of facts contradicting their public statements, failed to review information that they were obligated to monitor, or ignored clear and obvious signs of fraud. *See Novak v. Kasaks,* 216 F.3d 300, 308 (2d Cir. 2000). In each case, the burden remains on the plaintiff to set forth the specific reports, information, or other indicia of fraud that rendered the defendants conduct "highly unreasonable, representing an extreme departure from the standards of ordinary care." *In re Sotheby's Holdings, Inc.,* No. 00 Civ. 1041, 2000 WL 1234601, at *6 (S.D.N.Y. Aug. 31, 2000); *see also Novak,* 216 F.3d at 309.

Greene alleges that HDI's officers were motivated to overstate reports of revenue data by the prospect of maximizing their year-end bonuses. The Second Circuit has squarely rejected the sufficiency of allegations such as these, noting that "[i]ncentive compensation can hardly be the basis on which an allegation of fraud is predicated." *Acito,* 47 F.3d at 54. Thus, we cannot accept Greene's generalized allegations of motive, which would be imputable to any executive whose compensation comprises a performance-based component.

Furthermore, Greene has not set forth any allegations that would satisfy the alternative prong of proving scienter-conscious misbehavior or reckless conduct. The facts alleged are entirely consistent with nothing more than the existence of accounting irregularities, which, standing alone, fail to state a securities fraud claim. *See Novaks,* 216 F.3d at 309. Because Greene has not pointed to any indicia of the defendants' recklessness beyond the acknowledged accounting errors, the section 10(b) and Rule 10b-5 claims are dismissed.

III. Civil RICO

To state a claim under the civil RICO statute, "a plaintiff has two pleading burdens." *Moss v. Morgan Stanley, Inc.,* 719 F.2d 5, 17 (2d Cir. 1983). First, the complaint must allege that the defendant has violated "the substantive RICO statute . . . commonly known as 'criminal RICO.'" *Id.* In order to meet this

initial burden, a plaintiff must plead the defendant's (1) commission of two or more predicate acts (2) constituting a "pattern" (3) of "racketeering activity" (4) directly or indirectly investing in, or maintaining an interest in, or participating in (5) an enterprise, (6) the activities of which affect interstate or foreign commerce. *See id.* Allegations in support of predicate acts sounding in fraud, such as mail or wire fraud, must satisfy the rigors of Fed. R. Civ. P. 9(b). *See Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir. 1993); *Zhu v. First Atlantic Bank*, No. 05 Civ. 96, 2005 WL 2757536, at *3 (S.D.N.Y. Oct. 25, 2005). Plaintiffs face a second pleading hurdle in the civil RICO requirement that the injury to business or property occur by reason of a violation of the criminal RICO statute. *See Moss*, 719 F.2d at 17.

As with the 10b-5 securities fraud claim, the defendants contest the sufficiency of the allegations in support of each element of Greene's civil RICO cause of action. In light of our conclusions with respect to the deficiencies in pleading scienter, *supra* Section III, we hold that Greene has not adequately alleged the requisite intent for mail and wire fraud, the predicate acts of his RICO claim, and need not rule on the defendants' remaining arguments in favor of dismissal.

A. The Inadequacy of Greene's Scienter Allegations Is Fatal to His Civil RICO Claim.

Fraudulent intent is an element of mail and wire fraud and, as with Rule 10b-5 causes of action, the facts alleged in the complaint must give rise to a strong inference of such intent. *See Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176-77 (2d Cir. 1993). The Second Circuit courts apply the standard two-pronged approach – motive and opportunity or conscious misbehavior – in determining whether the complaint sufficiently alleges scienter to state a mail or wire fraud predicate act as part of a RICO claim. *Powers v. British Vita, P.L.C.*, 57 F.3d 176, 184 (2d Cir. 1995); *Zhu*, 2005 WL 2757536, at *3; *Rothberg v. Chloe Foods Corp.*, No. CV-06-5712, 2007 WL 2128376, at *16 (E.D.N.Y. July 25, 2007). Having failed to justify an inference of intent for his 10b-5 claim, Greene cannot rely on mail and wire fraud as predicate acts because the scienter element of those acts is supported by the same underlying factual allegations and analyzed under analogous pleading principles. *See Mills*, 12 F.3d at 1176-77. Without more than the fact that HDI's senior managers were awarded performance-based compensation, the RICO claims must be dismissed for failure to adequately plead a predicate act. *See, e.g., Moss*, 719 F.2d at 18, n.14; *Sommerville v. Major Exploration, Inc.*, 576 F. Supp. 902, 913-14 (S.D.N.Y. 1983).

IV. State Law Claims

Greene alleges common law fraud, negligent misrepresentation and breach of fiduciary duty arising out of the same nucleus of facts as the 10b-5 and RICO claims. For the reasons discussed *supra* Section II, the common law fraud claim is dismissed. *See Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 168 (2d Cir. 2005) ("Any fraud must be pled with particularity, Fed. R. Civ. P. 9(b); but the rule is applied assiduously to securities fraud."); *S.Q.K.F.C., Inc. v. Bell Atl. TriCon Leasing Corp.*, 84 F.3d 629, 633 (2d Cir. 1996) (applying the heightened Rule 9(b) pleading standard to common law fraud).

With respect to breach of fiduciary duty and negligent misrepresentation,[1] New York courts have

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[1] Under New York choice-of-law principles, "the law of the jurisdiction with the most significant interest in, or relationship to, the dispute" should be applied. *White v. ABCO Engineering Corp.*, 221 F.3d 293, 301 (2d Cir. 2000); *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 491 N.Y.S.2d 90 (1985). The relevant state interests to be taken into account are, principally, the domicile of the parties and the locus of the tort, which for claims sounding in fraud and misrepresentation is the state where the injury occurred. *See BHC Interim Funding, L.P. v. Finantra Capital, Inc.*, 283 F. Supp. 2d 968, 990-91 (S.D.N.Y. 2003); *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories*, 201 F. Supp. 2d 236, 287 n.32 (S.D.N.Y. 2002); *see also Sack v. Low*, 478 F.2d 360, 366 (2d Cir. 1973) (most significant consideration is where plaintiffs "lived and conducted their investment activities").

The only perceptible contact to Delaware is HDI's incorporation in the state. That connection, standing alone, is insufficient to give rise to an interest in this litigation that

(Continued on following page)

long-recognized that such claims are preempted by the Martin Act, N.Y. Gen. Bus. Law § 352 *et seq.*, which grants the Attorney General exclusive enforcement powers over various fraudulent and deceitful practices in connection with the sale and purchase of securities. *See Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 190 (2d Cir. 2001) (citing cases addressing preemption of breach of fiduciary duty claims); *In re Marsh & McLennan Cos. Sec. Litig.*, 501 F. Supp. 2d 452, 495 (S.D.N.Y. 2006) (citing cases addressing preemption of negligent misrepresentation claim). Consequently, Greene's breach

---

would justify the application of Delaware law. Thus, we are faced with a choice between the laws of New Jersey, where HDI maintains its principle place of business and the individual defendants are domiciled, and New York. Since Greene resides in New York and presumably (there is no suggestion to the contrary either in the amended complaint or the parties' briefs) his investment activities and losses occurred here as well, we apply New York law to his common law claims.

Having concluded that New York law governs in this case, we need not address Greene's asserted right to relief under the Delaware Securities Act, which applies to transactions subject to Delaware law under traditional choice-of-law rules. *See Singer v. Magnavox Co.*, 380 A.2d 969, 981 (Del. 1977), *overruled on other grounds by Weinberger v. UOP, Inc.*, 457 A.2d 701, 715 (Del. 1983); *Dofflemyer v. W.F. Hall Printing Co.*, 558 F. Supp. 372, 377-78 (D.C. Del. 1983). "[A] Delaware corporation is bound by the Act, if it is otherwise applicable. But it is not bound simply because the company is incorporated" there. *Singer*, 380 A.2d at 981. Because Greene has not alleged any nexus to Delaware other than HDI's incorporation in that state, the Delaware Securities Act claim is dismissed.

of fiduciary duty and negligent misrepresentation causes of action must be dismissed as well.

V. Federal Constitutional Claims

Greene advances vague federal constitutional claims arising out of HDI's failure to timely provide him with the restated financial reports reflecting the corrected revenue data. The amended complaint does not specify the constitutional cause of action that Greene wishes to pursue and only alleges discrimination as compared to similarly situated shareholders who did receive the corrected financial statements at the time they were made publicly available. In the absence of any allegations that the defendants engaged in joint activity with federal and state officials or discrimination on the basis of race or ethnicity, an equal protection claim grounded in the federal constitution or 42 U.S.C § 1981 cannot succeed. *See Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 152 (1970) (noting requirement of willful participation in joint activity with government officials for constitutional claims); *Albert v. Carovano,* 851 F.2d 561, 572 (2d Cir. 1988) ("Section 1981 was intended to combat racial or ethnic discrimination, nothing more."). Accordingly, the constitutional claims are dismissed.

CONCLUSION

For the reasons stated above, Greene's amended complaint is dismissed with prejudice in its entirety.

IT IS SO ORDERED.

Dated: New York, New York
November 19, 2007

/s/ Naomi Reice Buchwald
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT
JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X
CLIFF GREENE,

Plaintiff,

- against -

HANOVER DIRECT INC., ET AL.,

Defendants.
---------- X

MEMORANDUM AND ORDER

06 Civ. 13308 (NRB)

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Pro se plaintiff Cliff Greene brought this suit against Hanover Direct, Inc. ("Hanover Direct"), alleging that it "knowingly and intentionally conspired to manipulate its annual consolidated financial statements, for fiscal years 1998 through 2004," in a conspiracy to defraud its shareholders and artificially inflate its annual revenues. *See* Amended Complaint ¶¶ 6-7. Mr. Greene has now attempted to file a document entitled: "Demand for Appraisal Rights Pursuant to 'DGCL' (Delaware General Corporation Law) Section 262." The Clerk of the Court declined to accept the document for filing.

Upon review of the above-cited statute, it appears that plaintiff's rights are limited "to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock." *See* 8 Del. C.

§ 262(a). Accordingly, even assuming that the document could properly be filed and treated as a motion, we would deny the motion, as the statute upon which he relies does not afford him the remedy he seeks in this Court, but instead limits appraisal rights to Delaware's Chancery Court.

CONCLUSION

Treating plaintiff's submission as a motion for appraisal rights, it is denied.

IT IS SO ORDERED.

Dated: New York, New York
April 17, 2007

/s/ Naomi Reice Buchwald
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

APPENDIX D

MEMO ENDORSED

(*See* p. 2)

ReedSmith

Reed Smith LLP

Andrew L. Morrison
Direct Phone: 212.521.5422
Email:
amorrison@reedsmith.com

599 Lexington Avenue
New York, NY 10022-7650
+1 212 521 5400
Fax +1 212 521 5450

April 26, 2007

BY HAND DELIVERY

Hon. Naomi Reice Buchwald
United States District Court Judge
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: Greene v. Hanover Direct, Inc., et al.
06 Civ 13308 (NRB)

Dear Judge Buchwald:

We represent the defendants, Hanover Direct, Inc., William B. Wachtel, Wayne B. Garten and Stuart Feldman in connection with the above-referenced action commenced by plaintiff Cliff Greene, pro se. A copy of the complaint is annexed hereto as Exhibit "A" for the Court's ease of reference. Defendants would like to move the Court for an order dismissing the complaint pursuant to Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 9(b) based upon the complaint's failure

to (1) plead fraud with particularity; (2) set forth the elements of a RICO claim; and (3) set forth the elements of securities fraud claims including, but not limited to, failure to plead loss causation, scienter, and reasonable reliance.

Pursuant to paragraph 2(a) of Your Honor's Individual Practices we respectfully request that the Court schedule a pre-motion conference to discuss defendants' contemplated motion to dismiss. In addition, we respectfully request the Court extend defendants' time to respond to the complaint to a date set by the Court at the requested conference. We have attempted to reach Mr. Greene to discuss an extension of time to respond to the complaint pending the contemplated motion to dismiss. Specifically, we have tried to call Mr. Greene during the day and at night and even on weekends at the number in the pro se complaint but are not able to reach Mr. Greene by telephone. In addition, we sent a letter to Mr. Greene by overnight courier to the address given by Mr. Greene in the complaint, but it was not delivered because of a lack of an apartment number. We then sent another copy of the letter after obtaining Mr. Greene's apartment number. A copy of the letter is annexed hereto as Exhibit "B." Mr. Greene finally responded by letter dated April 23, 2007, received by us today, advising us that he refuses to allow defendants additional time to respond to the complaint. A copy of Mr. Greene's letter is annexed hereto as Exhibit "C."

Wherefore, we respectfully request the Court to "so order" this letter to extend defendants' time to respond to the complaint to a date set by the Court at the pre-motion conference.

Respectfully submitted,

/s/ Andrew Morrison
Andrew L. Morrison

ALM:ka
Enclosures

cc: Mr. Cliff Greene (via hand delivery)

[Defendants' may have until May 15, 2007 to answer or otherwise move. No premotion conference is required /s/ NB]

SO ORDERED

/s/ Naomi Reice Buchwald
U.S.D.J. 4/30/07

APPENDIX E

MEMO ENDORSED

NAOMI REICE BUCHWALD,
UNITED STATES DISTRICT COURT JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
500 PEARL STREET,
NEW YORK, NEW YORK 10007

06 CIV. 13308 (NRB)

SUBJECT: REQUEST TO VACATE MEMO ENDORSED ORDER DATED, 4-30-07, ON GROUNDS LISTED IN PARS. 1, AND 2, HEREIN BELOW

RE : CLIFF GREENE V. HANOVER DIRECT, INC., ET AL.
CIVIL ACTION No. 06-13308 (NRB)

DEAR JUDGE BUCHWALD:

THIS HAS TO DO WITH THE ABOVE MENTIONED, SUBJECT, REFERENCE MATTER.

1. PLAINTIFF RESPECTFULLY REQUEST THAT YOUR HONOR RECONSIDER MEMO ENDORSED ORDER DATED 4-30-07, AND VACATE SAME ON GROUNDS THAT DEFENDANTS FAILED TO COMPLY WITH RULE 6, (b), (2), FED. R. CIV. P., -2- FRAUD UPON THE COURT.

DATED: COUNTY OF KINGS
BROOKLYN, NEW YORK
MAY 11, 2007

/s/ Cliff Greene, pro se

CLIFF GREENE, PRO SE

[Home Address Omitted]

718 493 7028

CC: ANDREW L. MORRISON, ESQ.,

REED SMITH LLP
599 LEXINGTON AVENUE
NEW YORK, NEW YORK 10022-7650

212 521 5400

[Endorsement

Application denied

So Ordered [Illegible]

May 28, 2007 /s/ Naomi Reice Buchwald, USDJ]

APPENDIX F

MEMO ENDORSED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

CLIFF GREENE, PRO SE

PLAINTIFF,

-AGAINST-

HANOVER DIRECT, INC., ET AL., WILLIAM B. WACHTEL, CHAIRMAN OF THE BOARD OF DIRECTORS, AND IS CHAIRMAN OF THE NOMINATING COMMITTEE.,

WAYNE P. GARTEN, CHIEF EXECUTIVE OFFICER, PRESIDENT AND DIRECTOR.,

STAURT [sic] FELDMAN, CHAIRMAN OF THE EXECUTIVE COMMITTEE, AND A MEMBER OF THE COMPENSATION COMMITTEE AND DIRECTOR.

DEFENDANTS.

----------X

06 CIV. 13308(NRB)

NOTICE

REQUEST FOR DECLARATORY JUDGMENT

1. REQUEST FOR DECLARATORY JUDGMENT PURSUANT TO RULE 57., FED. R. CIV. P., AND 28 U.S.C., SECTION 2201., IS BASED ON GROUNDS PROVIDED FOR IN LAWS THAT GOVERNS EXTENSION OF TIME *AFTER* THE

EXPIRATION OF TIME GRANTED BY THIS COURTS' LAW AS STATED ON FACE OF AMENDED SUMMONS. "AN ANSWER TO THE COMPLAINT WHICH IS HEREWITH SERVED UPON YOU, WITHIN 20 DAYS AFTER SERVICE OF THIS SUMMONS UPON YOU, EXCLUSIVE OF THE DAY OF SERVICE. IF YOU FAIL TO DO SO, JUDGMENT BY DEFAULT WILL BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT. YOU MUST ALSO FILE YOUR ANSWER WITH THE CLERK OF THIS COURT WITHIN A REASONABLE PERIOD OF TIME AFTER SERVICE."

[Endorsement

Motion for declaratory judgment based on a default argument is denied. If plaintiff wishes to respond on the merits to defendants' motion to dismiss, we may do so by June 20, 2007.

Courtesy Copy For
Naomi Reice Buchwald,
United States District Judge

So Ordered.

5/31/07 /s/ Naomi Reice Buchwald, USDJ]

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Dennis Jacobs
CHIEF JUDGE

Catherine O'Hagan Wolfe
CLERK OF COURT

Date:	4/16/09
Docket Number:	07-5711-cv
Short Title:	Greene v. Hanover Direct, Inc.
DC Docket Number:	06-cv-13308
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Naomi Buchwald

NOTICE OF HEARING DATE

Date of Hearing: Tuesday June 2, 2009

Time Allotted for Oral Argument: 5 minutes per side

The above referenced appeal is scheduled for oral argument on the day indicated in the **Ceremonial Courtroom (9th Floor)**, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, Manhattan, New York City.

Court convenes promptly at 10:00 a.m. Counsel and non-incarcerated pro se litigants must be present for argument unless earlier excused. Motions to adjourn argument must be promptly made and will be granted for grave reason only.

Counsel and non-incarcerated pro se litigants presenting oral argument must register with the courtroom deputy no later than 9:30 a.m.. Please be advised that, due to the technical difficulties, we are unable to provide offsite Video Argument until further notice. It is hoped that we will again be able to offer this convenience in the future.

Counsel and non-incarcerated pro se litigants may seek the Court's permission to waive oral argument by submitting a letter request to the Office of Clerk (attention Calendar Deputy) not later than five days before the hearing week.

Report all settlements to the Calendar Deputy as soon as effected. Ordinarily, and subject to the ruling of the presiding judge, motions or stipulations to withdraw with prejudice will be granted without appearance by counsel, but motions or stipulations to withdraw without prejudice filed within three business days of the argument will be considered at the time of argument, with counsel present and prepared to argue the merits.

CATHERINE O'HAGAN WOLFE, Clerk

Complete Items below and return copy of entire form to the Clerk's Office

Name of the Attorney/Pro Se
Presenting argument: Cliff Greene, Pro Se

Firm Name (IF APPLICABLE):

Current Telephone Number: 718-493-7028

The above named Attorney Represents:

(x) APPELLANT-PETITIONER ( ) INTERVENOR

( ) APPELLEE-RESPONDENT ( ) AMICUS CURIAE

Signature:

Date: May 06-09 /s/ Cliff Greene, Pro Se

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Dennis Jacobs
CHIEF JUDGE

Catherine O'Hagan Wolfe
CLERK OF COURT

Date:	5/14/09
Docket Number:	07-5711-cv
Short Title:	Greene v. Hanover Direct, Inc.
DC Docket Number:	06-cv-13308
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Naomi Buchwald

LOCAL RULE 34(b) NOTICE OF THE COURT'S INTENT TO HEAR THE FOLLOWING APPEAL ON SUBMISSION

The Court, sua sponte in the exercise of its authority to regulate the docket, has determined that in this appeal the facts and legal arguments are adequately presented in the briefs and records and the decision process will not be significantly aided by oral argument.

Pursuant to Local Rule 34(b) the parties are hereby notified that this appeal will be determined on submission. If you are of the view that oral argument is necessary in the appeal, you must advise the Court by letter filed with the Clerk no later than (5/26/09). Such letter should set forth the reasons why the Court should hear oral argument.

Please direct all inquiries regarding this notice to the calendar department at 212-857-8595.

cc: Cliff Greene
Andrew L. Morrison

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLIFF GREENE, PRO SE
PLAINTIFF,

–AGAINST–

HANOVER DIRECT, INC., ET AL.,
DEFENDANTS.

06 CIV. 13308 (NRB)

RECEIVED
APR 24 2007
PRO SE
OFFICE

NAOMI REICE BUCHWALD,
UNITED STATES DISTRICT JUDGE

SUBJECT : 1. PRE-MOTION CONFERENCE

2. BASIS FOR THE ANTICIPATED MOTION FOR DEFAULT JUDGMENT PURSUANT TO RULE 55. DEFAULT (b)(2), FED. R. CIV. P.

RE : AMENDED COMPLAINT AND AMENDED SUMMONS., DEFENDANTS FAILURE TO PLEAD OR OTHERWISE DEFEND AS STATED ON THE FACE OF AMENDED SUMMONS., ISSUED BY PRO SE CLERK'S OFFICE MARCH 13, 2007, AND PERSONALLY SERVED UPON DEFENDANTS BY NEW YORK STATE LIC. PROCESS SERVER., ON MARCH 14, 2007.

DEAR JUDGE BUCHWALD:

1. THIS LETTER HAS TO DO WITH THE HEREIN ABOVE MENTIONED, SUBJECT, REFERENCE MATTER.

2. THIS ACTION HAVING BEEN COMMENCED BY THE FILING OF A LIMITED COMPLAINT AND ISSUANCE OF A SUMMONS ON NOVEMBER 17, 2006. HOWEVER, SERVICE UPON THE DEFENDANTS WERE NEVER MADE.

3. PLAINTIFF, FILED AN AMENDED COMPLAINT AND ISSUANCE OF AN AMENDED SUMMONS ON MARCH 13, 2007., AND FOUR (4) COPIES OF SAID AMENDED COMPLAINT AND AMENDED SUMMONS HAVING BEEN PERSONALLY SERVED UPON DEFENDANTS HANOVER DIRECT, INC., ET AL., ON MARCH 14, 2007. PROOF OF WHICH SERVICE WAS FILED WITH THE COURT ON MARCH 15, 2007.

4. DEFENDANTS HAVING FAILED TO APPEAR, ANSWER OR OTHERWISE MOVE WITH RESPECT TO THE AMENDED COMPLAINT AND SAID DEFENDANTS; TIME TO APPEAR, ANSWER OR OTHERWISE MOVE HAVING EXPIRED, HENCE, BASIS FOR THE ANTICIPATED

MOTION FOR DEFAULT PURSUANT TO RULE 55., DEFAULT (b), (2), FED. R. CIV. P.

5. ADDITIONAL BASIS FOR THE ANTICIPATED MOTION FOR DEFAULT JUDGMENT., *SEE* THE FOLLOWING JUDICIAL CASE LAWS:

SEE FISHER V. TAYLOR, D.C. TENN. 1940. 1 F.R.D. 448.

SEE GEORGIA POWER CO., D.C. Ga. 1975. 409 F. SUPP. 332.

SEE U.S., FOR AND IN BEHALF OF FEDERAL HOUSING ADMINISTRATION V. JACKSON, D.C. Or. 1938. 25 F. SUPP. 79.

SEE SOUTHERN GENERAL INS. CO. V. O'KEEFE, D.C. [Illegible]. 1967. 275 F. SUPP. 107.

CONCLUSION

PLAINTIFF, PREY [sic] THAT BASIS FOR ANTICIPATED MOTION FOR DEFAULT JUDGMENT PURSUANT TO RULE 55. DEFAULT (b)(2), ALONG WITH JUDICIAL CASE LAWS PRESENTED HEREIN SHOULD BE SUFFICIENT FOR

THE COURT TO GRANT DEFAULT JUDGMENT.

RESPECTFULLY SUBMITTED,

CLIFF GREENE, PRO SE
[Home Address Omitted]
718 493 7028

/s/ Cliff Greene, Pro Se
CLIFF GREENE, PRO SE

APPENDIX J

CHARLES E.
SCHUMER
NEW YORK

United States Senate
WASHINGTON, DC 20510

COMMITTEES:

BANKING
ENERGY
JUDICIARY
RULES

March 6, 2007

Jane Cobb
Director of Legislative Affairs
Securities and Exchange Commission
450 Fifth Street N.W.
Washington, DC 20549

Dear Ms. Cobb:

The attached letter was received from my constituent, Cliff Greene, who has an issue which is under the jurisdiction of the Securities and Exchange Commission.

I know I can count on your cooperation in reviewing the self-explanatory material and advising me of your findings as expeditiously as possible. Please reply to my office located at 757 Third Avenue, Suite 17-02 New York, New York 10017. You may call Venecia Fernandez of my staff at 212-486-4430 if

there are any questions. Thank you for your assistance in this matter.

Sincerely,

/s/ Charles Schumer
CHARLES E. SCHUMER
United States Senate

CES/vf

[SEAL]

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
STATION PLACE
100 F STREET, NE
WASHINGTON, DC 20549

OFFICE OF FILINGS AND
INFORMATION SERVICES

Mail Stop 5100 March 8, 2007

Mr. Cliff Greene
[Home Address Omitted]

Re: Freedom of Information Act (FOIA),
5 U.S.C. § 552
Request No. 07-02233-FOIA; 07-00001-CONG

Dear Mr. Greene:

Further response is made to your request for records concerning Hanover Direct, Inc.

After consulting with the staff, we have identified records located in our New York Office that may be responsive to your request. We have requested the documents from that Office and when they are

received, they will be reviewed for a release determination. We expect to send you a final response within 30 to 60 days.

In the interim, if you have any questions, you may contact me at (202) 551-8312.

Sincerely,

/s/ Warren E. Jackson
Warren E. Jackson
FOIA/Privacy Act
Research Specialist

APPENDIX K

[SEAL]

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
STATION PLACE
100 F STREET, NE
WASHINGTON, DC 20549

OFFICE OF FILINGS AND
INFORMATION SERVICES

Mail Stop 5100 March 12, 2007

The Honorable Charles E. Schumer
United States Senate
757 Third Avenue
Suite 17-02
New York, NY 10017

Dear Senator Schumer:

This responds to your March 6, 2007 inquiry on behalf of Cliff Greene. Mr. Greene has asked you to determine the status of the Freedom of Information Act (FOIA) request he has pending with the Commission.

Mr. Greene submitted a FOIA request dated December 5, 2006, requesting a variety of information regarding Hanover Direct, Inc. dating back to 1998. The request was received in the Commission's FOIA office on December 14, 2006, and assigned SEC FOIA number 07-02233. The request was promptly forwarded to those program offices holding records which may be responsive to his request.

On January 10, 2007, Mr. Greene was sent a letter advising him that the FOIA Specialist was consulting with other program offices in order to notify him of the status of his request. On March 8, 2007, Mr. Greene was again notified of the status of his request, stating that records had been located in the New York Office which may be responsive to his request, and that they had been forwarded to the FOIA Office for review. A copy of the March 8 letter is enclosed.

I am confident that Mr. Greene will receive a final response to his request in the next 30 to 60 days, as stated in the March 8 letter. He may contact Warren Jackson with any questions regarding his request. Mr. Jackson may be reached at 202-551-8312.

Sincerely,

/s/ Celia Winter
Celia Winter
FOIA/Privacy Act Officer

Enclosure

APPENDIX L

[SEAL]

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
STATION PLACE
100 F STREET, NE
WASHINGTON, DC 20549

Office of Freedom of Information
& Privacy Act Operations

Mail Stop 5100 May 31, 2007

Mr. Cliff Greene
[Home Address Omitted]

Re: Freedom of Information Act (FOIA),
5 U.S.C. § 552
Request No. 07-02233-FOIA/07-00001-CONG

Dear Mr. Greene:

This letter is in further response to your request for records concerning Hanover Direct, Inc.

We have completed our review of some of the nonpublic records that may be responsive to your request. Access is granted to the records, except for third-party names, third-party and/or fax numbers and home and e-mail addresses which are protected under 5 U.S.C. § 552(b)(7)(C), 17 CFR § 200.80(b)(7)(iii). Release of this information could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Please note, you are classified as a private requestor. As such, you are allowed the first 100

pages of releasable records free of copying charges. However, the charges for all pages exceeding 100 are at the cost of 24 cents per page. We have forwarded the records, which at this time are less than 100 pages, to our contractor to be duplicated and provided directly to you.

With respect to the withheld information, you have the right to appeal our decision to our General Counsel under 5 U.S.C. § 552(a)(6), 17 CFR § 200.80(d)(5) and (6).

Your appeal must be in writing, clearly marked "Freedom of Information Act Appeal," and should identify the requested records. The appeal may include facts and authorities you consider appropriate.

Send your appeal to the FOIA/Privacy Act Office of the Securities and Exchange Commission located at Station Place, 100 F Street NE, Mail Stop 5100, Washington, D.C. 20549, or deliver it to Room 1120 at that address. Also, send a copy to the SEC Office of the General Counsel, Mail Stop 9612, or deliver it to Room 1120 at the Station Place address.

Finally, additional nonpublic records that may be responsive to your request are subject to a request for confidential treatment under 17 CFR § 200.83. We have notified the confidential treatment requester to give them an opportunity to substantiate their claim for confidentiality. We will advise you of the accessibility of these records once all issues raised by the submitter have been resolved and/or addressed.

If you have any questions, you may contact Warren Jackson of my staff at (202) 551-8312.

Sincerely,
FOIA/Privacy Act Officer

by: /s/ Brenda L. Fuller
Brenda L. Fuller
FOIA/Privacy Act
Branch Chief

APPENDIX M

Rule 6

Time

CIVIL PROCEDURE **Rule 6**

C. Wright & A. Miller, Federal Practice and Procedure: Civil XXX-III-LXVII (1987). There is current disagreement on the issue of the applicability of Rule 6(a) to federal statutes of limitation. Compare *Lawson v. Conyers, Chrysler, Plymouth & Dodge Trucks, Inc.*, 600 F.2d 465, 466 & n.1 (5th Cir. 1979) ("This court has consistently used Rule 6(a)'s method for computing federal statutory time limitations.") [and] *Wirtz v. Peninsula Shipbuilders Ass'n,* 382 F.2d 237, 238-40 (4th Cir. 1967) with *Joint Council Dining Car Employees, Local 370 v. Delaware, L. & W. R.R.,* 157 F.2d 417, 420 (2d Cir. 1946) ("Rule 6(a) is a rule of procedure relating to acts done or proceedings had after the commencement of action. . . . It is not intended to modify and change existing statutes of limitation."). Because of the Supreme Court's recent decision in *Walker v. Armco Steel Corp.*, 100 S.Ct. 1978 (1980), any argument seems foreclosed for the application of Rule 6(a) to a state statute of limitations in a federal diversity state claim action. State methods of computing state statute of limitations time periods must be followed by the federal court. See *Alonzo v. ACF Property Management, Inc.,* 643

[1] Release #9, 12/89.

F.2d 578, 581 (9th Cir. 1981) ("Computation of time provisions, like the commencement of action provisions involved in *Ragan* and *Armco Steel,* are 'an integral part of the statute of limitations.' The computation of time provisions reflect a strong policy in favor of recognition of certain state holidays on specified days. As a result, we find that *Ragan* and *Armco Steel* require the district court to use the state rather than the federal computation of time statute.").

The 1985 amendment to Rule 6(a), effective August 1, 1985, makes the following changes: (1) If the last day of the time period is a day when the clerk's office is inaccessible because of weather conditions or other events, then that last day is excluded from the time period computation; (2) In place of the former period of less than 7 days, intermediate Saturdays, Sundays, and legal holidays are excluded from the time computation when the period allowed for response is less than *11* days; (3) The Birthday of Martin Luther King, Jr. (the third Monday of January) is now a legal holiday that must be acknowledged in the computation of time periods governed by Rule 6(a).

Rule 6(b)(1) grants a court discretion to enlarge a time period for cause shown if the request comes before the expiration of the initial period or an extension of that period. Although this subdivision does not require notice to an opponent, local court rules may reflect a reluctance to enlarge without a noticed motion. E.g., "The court may, in its discretion,

grant an initial extension *ex parte* upon the affidavit of counsel that a stipulation extending time cannot reasonably be obtained, explaining the reasons why such stipulation cannot be obtained and the reasons why the extension is necessary." E.D. Cal. R. 142(b) (1989). The meaning of "cause shown" is without significant case definition. See generally *Poe v. Cristina Copper Mines, Inc.*, 15 F.R.D. 85, 86-88 (D. Del. 1953).

Rule 6(b)(2) permits enlargement, upon motion, after the specified period expires. The applicant must show cause and excusable neglect. The courts passing on Rule 6(b)(2) motions have demonstrated varying attitudes toward failure to act timely. Some courts have been flexible: *United States v. Miller Bros. Constr. Co.*, 505 F.2d 1031, 1035 (10th Cir. 1974) ("A discretionary extension should be liberally granted absent a showing of bad faith on the part of the movant . . . or undue prejudice to other parties. . . ."). *Coady v. Aguadilla Terminal, Inc.*, 456 F.2d 677, 678-79 (1st Cir. 1972). *Anderson v. Stanco Sports Library, Inc.*, 52 F.R.D. 108, 109-110 (D.S.C. 1971). Other courts have been less disposed to grant relief to a tardy litigant: *Supermarkets Gen. Corp. v. Grinnell Corp.*, 490 F.2d 1183, 1186 (2d Cir. 1974), *aff'g* 59 F.R.D. 512, 513-15 (S.D.N.Y. 1973). *Graham v. Pennsylvania R.R.*, 342 F.2d 914, 915-16 (D.C. Cir. 1964), *cert. denied*, 381 U.S. 904 (1965). *Driver v. Gindy Mfg. Corp.*, 24 F.R.D. 473, 474-75 (E.D.Pa. 1959). Regardless of this apparent difference in approach to Rule 6(b)(2), the outcome probably

depends most on the type of proceeding not timely met.

Excepted from enlargement discretion in Rule 6(b), are the times for taking action under Rules 50(b), 52(b), 59(b),(d), and (e), and 60(b). This exception is strictly construed. See, e.g., *Hulson v. Atchison, T. & S. F. Ry.*, 289 F.2d 726 (7th Cir. 1961), *cert. denied*, 368 U.S. 835 (1961). The 1983 amendment to Rule 6(b)(2) adds two additional Rules that are excepted from enlargement discretion: Rule 50(c)(2) and Rule 74(a).

Rule 6(c). In 1963, Congress enacted a law, Pub. L. No. 88-139, 77 Stat. 437 (codified at 28 U.S.C. § 138 (1976)) which ended the observance of district court formal terms. This law made Rule 6(c) irrelevant and it is rescinded, effective July 1, 1966.

Rule 6(d) applies to written and noticed motions. The motion and its notice must be served five days prior to hearing unless a Rule or the court otherwise provides for cause shown by *ex parte* application.

APPENDIX N

FedEx® Express *US Airbill* FedEx Tracking Tracking Number 8610 0865

1 **From** This portion can be removed for Recipient's records.

Date 4/17/07 FedEx Tracking Number 861008658305

Sender's Name ANDREW MORRISON

Phone 212 521-5426

Company REED SMITH LLP

Address 599 LEXINGTON AVE FL 28

City NEW YORK State NY ZIP 10022-7684

2 **Your Internal Billing Reference**
999906/~~9300~~00365/3286

3 **To**

Recipient's Name MR CLIFF GREENE Phone

Company

Recipient's Address [Home Address Omitted]

Dept/Floor/Suite/Room

We cannot deliver to P.O. boxes or P.O. Zip codes.

Address

To request a package be held at a specific FedEx location, print FedEx address here.

City BROOKLYN State NY ZIP 11213

0352555106

FedEx Express

EXCEPTION/SEND AGAIN
Customer's Package/Shipment was delayed due to:

FOR IN STATION USE ONLY

☐ Package Researched Date: _____ Initial: _____

Comments:

Ex. WRG ADDR Pcs: 1 1 of 1
18APR07 09:02 Emp#: 572409 Rt#: 743

[Illegible]: 1533 PRESIDENT STREET APT#2
INCORRECT APT/SUITE

[Illegible]#: 861008658305

FedEx. I picked this pkg up at Fed.Ex – Stanly–
6108th St. Brooklyn, N.Y. on Fri – 4-20-07
[Illegible] 7:59-8:10 pm
Door knob – Notice 4-2[illegible]-07 – [Illegible]

APPENDIX O

FedEx. PRIORITY OVERNIGHT
emp: 340139 19APR97
Door Tag Number → DT1013 6240 8578 Peel here and place label on package. ↗

This was our: ☐ 1st Attempt ☒ 2nd Attempt ☐ Final Attempt

On (day/date) 4/18 at (time) _____

we tried to pick up/deliver 1 package(s).

Courier Employee No. _____ Route No. _____

☐ We were unable to pick up your package(s) because:

☐ This is a FedEx ExpressTag® shipment. Contact the merchant (not FedEx) to reschedule a pickup.

☐ Other _____

☒ We could not leave your package(s) because:

☐ A signature is required in person.

☐ Shipper requests direct signature option. See back for further explanation.

☐ Shipper requests adult signature option. See back for further explanation.

☐ Package contains dangerous goods.

☒ Security reasons/restrictions.

☐ C.O.D. amount due $_____ (Cash will not be accepted.)

☐ Unsecured ☐ Secured See back for acceptable forms of payment.

☐ Bill Recipient option was selected by Shipper. Please provide your FedEx account number.

☐ Shipper requests indirect signature option. See back further explanation.

Leave this signed form on your door, and we'll leave your package(s).

By my signature, I am requesting that FedEx leave the shipment at this address. I agree that FedEx will not be liable for any loss or damage that results from leaving this shipment as I have requested.

APPENDIX P

THE NEW YORK TIMES,
SUNDAY, JANUARY 21, 2007

OPENERS

SUITS

PAY FOR, UH, WHAT? Performance-based executive pay is a fine idea, as long as the performance is real. That is under scrutiny again, this time at a former ConAgra Foods subsidiary.

Federal investigators have accused three executives of the subsidiary, United Agri Products, of using unlawful accounting practices to inflate revenue there in 1999 and 2000, to qualify for bonuses.

James Charles Blue, former president and chief executive of ConAgra Agri Products Companies, and **Victor Campbell**, former controller for United Agri Products, agreed to settle the complaint without admitting or denying the accusations. Mr. Blue will repay $622,087 and Mr. Campbell $198,074, pending approval by the Federal District Court in Denver, where the complaint was filed.

Randy Cook, the former president of United Agri's North America operations, was also accused. In addition to higher bonuses for those years, he received additional unwarranted remuneration through the company's profit-based compensation plan, according

to a Securities and Exchange Commission civil-suit complaint.

The commission said it was still seeking to have him "disgorge all ill-gotten gains along with prejudgment interest."

The executives' actions, federal securities regulators said, caused ConAgra to overstate its before-tax income more than 7 percent each year – $46.7 million in fiscal 1999 and $48.5 million in fiscal 2000.

ELIZABETH OLSON

APPENDIX Q

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CLIFF GREENE, PRO SE, PLAINTIFF, -AGAINST- HANOVER DIRECT, INC., ET AL., WILLIAM B. WACHTEL, CHAIRMAN OF THE BOARD OF DIRECTORS, AND IS CHAIRMAN OF THE NOMINATING COMMITTEE., WAYNE P. GARTEN, CHIEF EXECUTIVE OFFICER, PRESIDENT AND DIRECTOR., STAURT [sic] FELDMAN, CHAIRMAN OF THE EXECUTIVE COMMITTEE, AND A MEMBER OF THE COMPENSATION COMMITTEE AND DIRECTOR. DEFENDANTS.	06 CIV. 13308 (NRB) "AMEND:" COMPLAINT PLAINTIFF DEMANDS TRIAL BY JURY

HANOVER DIRECT, INC.
1500 HARBOR BOULEVARD
WEEKHAWKEN, NEW JERSEY 07087

CLIFF GREENE, PRO SE
[Home Address Omitted]
(718) 493-7028

(ADDRESS OF PRIN-
CIPAL EXECUTIVE
OFFICES)
(201) 863-7300

[Cause of Action brought to Court by Plaintiff]

* * *

6. Plaintiff alleges that HDI knowingly and intentionally conspired to manipulate its annual consolidated financial statements, for fiscal years 1998 through 2004, by using unlawful business practices.

7. Plaintiff alleges that defendants engaged in a fraudulent scheme to defraud its shareholders by allegedly, knowingly and intentionally conspired to manipulate Hanover Direct, Inc. ("HDI"), annual consolidated financial statements for personal gains by using unlawful accounting practices and artificially inflating its annual revenues so as to maximize senior managers year end bonuses who held performance contractual agreements, expressed or implied.

APPENDIX R

SEC Informal Inquiry:

See Note 1 to the consolidated financial statements for a discussion of the informal inquiry being conducted by the SEC relating to the Company's financial results and financial reporting since 1998.

Claims for Post-Employment Benefits

The Company was involved in four lawsuits instituted by former employees arising from the Company's denial of change in control ("CIC") benefits under compensation continuation plans following the termination of employment. One of these lawsuits was settled during the second fiscal quarter.

Two of thse cases arose from the circumstances surrounding the Restatement:

Charles Blue v. Hanover Direct, Inc., Wayne Wachtel, Stuart Feldman, Wayne Garten and Robert Masson, No.: L-5153-05 (Super. Ct. N.J., Law Div. Hudson Cty, filed Oct. 24, 2005) is an action instituted by the Company's former Chief Financial Officer who was terminated for cause on March 8, 2005. The complaint seeks compensatory and punitive damages and attorney's fees and alleges retaliation, mental anguish and reputational damage, loss of earnings and employment and racial discrimination. The Company is mounting a vigorous defense in the action, which is in the discovery phase, and believes that Mr. Blue was properly terminated for

cause and that his claims are groundless. The parties to the lawsuit are engaging in discovery.

Frank Lengers v. Hanover Direct, Inc., Wayne Garten, William Wachtel, A. David Brown, Stuart Feldman, Paul S. Goodman, Donald Hecht and Robert Masson, No.: L-5795-05 (Super. Ct. N.J., Law Div. Hudson Cty, filed Nov. 16, 2005) was brought as a result of the Company terminating the employment of its former Vice President, Treasury Operations & Risk Management, on March 8, 2005 for cause. The complaint seeks compensatory and punitive damages and attorney's fees and alleges improper denial of CIC benefits, age and disability discrimination, handicap discrimination, aiding and abetting and breach of contract. The Company is mounting a vigorous defense in the action, which is in the discovery phase, and believes that Mr. Lengers was properly terminated for cause and that his claims are groundless. The parties to the lawsuit are engaging in discovery.

* * *

APPENDIX S

EXPLANATORY NOTE

16.

As explained herein, we have restated the condensed consolidated financial statements for, among other periods, the period ended June 26, 2004 which is included in this Form 10-Q (collectively, the "Restatement"). By way of summary, the Restatement corrects a revenue recognition issue that resulted in revenue being recorded in advance of the actual receipt of merchandise by the customer, corrects an error in the accounting treatment of discounts obligations for certain of the Company's buyers' club programs and corrects the premature reversal of a reserve for post employment benefits. The Restatement also records certain customer prepayments and credits inappropriately released and records other liabilities relating to certain miscellaneous catalog costs and other miscellaneous costs that were inappropriately not accrued in the deferred tax asset and liabilities to reflect the effect of the Restatement adjustments. For a more complete description of the Restatement, refer to Note 2 to the attached condensed consolidated financial statements. As previously disclosed in our Current Report on Form 8-K filed with the Securities and Exchange Commission ("SEC") on November 10, 2004, the financial statements and related financial information contained in, among other reports, the Form 10-Q for the fiscal quarter ended June 26, 2004

should no longer be relied upon. Throughout this Form 10-Q all referenced amounts for the period ended June 26, 2004 and comparisons thereto reflect the balances and amounts after giving effect to the Restatement.

EXPLANATORY NOTE

17.

As explained herein, we have restated the consolidated financial statements for the fiscal years ended December 27, 2003 and December 28, 2002 in its Annual Report on Form 10-K. We have also restated the quarterly financial information for fiscal 2003 and the first two quarters of fiscal 2004. See Note 2 to the accompanying consolidated financial statements (collectively, the "Restatement"). By way of summary, the Restatement also affects periods prior to fiscal 2002. The Restatements's impact on periods prior to fiscal 2002 has been reflected as an adjustment to accumulated deficit as of December 29, 2001 in the accompanying Consolidated Statements of Shareholders' Deficiency as well as the Selected Financial Data in Part 1, Item 6 of this Form 10-K. The Restatement corrects a revenue recognition issue that resulted in revenue being recorded in advance of the actual shipment of merchandise to the customer and the correction of an accounting policy to recognize revenue when the merchandise is received by the customer as opposed to when the merchandise is shipped, corrects an error in the accounting treatment of discounts obligations for certain of the

Company's buyers club programs, corrects two errors in the accounting treatment of a reserve for post-employment benefits including correcting the premature reversal of the reserve and other adjustments and recording legal fees in the proper periods that were inappropriately recorded related to the matter. The Restatement also records certain customer prepayments and credits inappropriately released and records other liabilities relating to certain miscellaneous catalog costs and other miscellaneous costs that were inappropriately not accrued in the appropriate periods. In addition we have made adjustments to the deferred tax asset and liability to reflect the effect of the Restatement adjustments. For a more complete description of the Restatement, refer to Note 2 to the attached consolidated financial statements. We have not amended our previously filed Annual Reports on Form 10-K or Quarterly Reports on Form 10-Q for the Restatement. As previously disclosed in our Current Report on Form 8-K filed with the Securities and Exchange Commission ("SEC") on November 10, 2004, the consolidated financial statements and related financial information contained in such reports for the fiscal years ended December 25, 1999, December 30, 2000, December 29, 2001, December 28, 2002 and December 27, 2003 and the fiscal quarters ended March 29, 2003, June 28, 2003, September 27, 2003, March 27, 2004 and June 26, 2004 should no longer be relied upon. Through this Form 10-K all referenced amounts for prior periods and prior period comparisons reflect the balances and amounts after giving effect to the Restatement.

As a result of the Restatement, we were unable to timely file the Form 10-K for the fiscal year ended December 25, 2004.

APPENDIX T

18.

2. PRIOR RESTATEMENT OF FINANCIAL STATEMENTS AND OTHER RELATED MATTERS

We restated the consolidated financial statements for the fiscal years ended December 27, 2003 and December 28, 2002 which were included in the Annual Report on Form 10-K filed for the 2004 fiscal year filed on February 21, 2006. We also restated the quarterly financial information for fiscal 2003 and the first two quarters of fiscal 2004 (collectively, the "Restatement"). The Restatement corrected errors in the account treatment of (i) a guarantee related to certain of our Buyer's Club programs, (ii) our revenue recognition policies on shipped merchandise, (iii) a reserve relating to claims for post employment benefits, (iv) customer prepayments and credits, and (v) certain other accruals. The consolidated financial statements reflect the effects of the Restatement.

As a result of the Restatement, the Audit Committee of the Board of Directors hired independent outside counsel to assist with an investigation of certain of the matters relating to the Restatement and other accounting-related matters. The Securities and Exchange Commission ("SEC") also informed the Company that it was conducting an informal inquiry which is ongoing.

The Company's common stock was formally suspended from trading on the American Stock

Exchange (the "AMEX") on February 2, 2005 as a result of the Company's inability to comply with the AMEX's continued listing standards and because the Company did not file on a timely basis its Form 10-Q for the fiscal quarter ended September 25, 2004 which in turn was attributable to the Restatement. The Common Stock was removed from listing and registration on the AMEX effective February 16, 2005. Current trading information about the Company's common stock can be obtained from the Pink Sheets (www.pinksheets.com) under the trading symbol HNVD.PK.

APPENDIX U

19.

From: [ ]*

Sent: Tuesday, July 12, 2005 11:51 AM

To: [ ]

CC: [ ]

Subject: Re: Bible Study in July

[ ] continues to engage in what my attorney, business partner and I believe to be clear criminal activities. My partner, [ ] (as you may recall he was the [ ] at Hanover during much of my tenure as [ ] will be sitting down with [ ] on Saturday morning to inform [ ] of the facts as we know them. The pattern of abuses of power, insider trading, making false allegations, subornation of perjury, and coersion [sic], in the middle of an SEC investigation, is palpable. [ ] plans to tell [ ] that he should get personal counsel and independently confirm this pattern of criminal behavior as [ ]. I have spoken to [ ] about this pattern of improper behavior before and he, I believe, thus far, has chosen to ignore my warnings. I wish him no harm but cannot condone what has and still is happening. My attorney as independently confirmed the patter of abuses. He spent over 10 years rising to a senior level at the SEC during the

---

* [Names, Addresses and Phone Numbers Omitted In Printing].

[ ] Administration. Best regards and [ ] and I look forward to Saturday. [ ]

APPENDIX V

ReedSmith

Reed Smith LLP
599 Lexington Avenue
New York, NY 10022-7650
+1 212 521 5400
Fax +1 212 521 5450

Lawrence J. Reina
Direct Phone: +1 212 549 0255
Email: lreina@reedsmith.com

February 28, 2008

Cliff Greene
[Home Address Omitted]

RE: Cliff Greene v. Hanover Direct, et al.

Dear Mr. Greene:

Please see the Notice of Appearance I have filed with the Second Circuit Court of Appeals in your current appeal.

Please be advised that Andrew Morrison is no longer with Reed Smith LLP. Any further correspondence or filings should be directed to me.

Very truly yours,

/s/ Lawrence J. Reina
Lawrence J. Reina

LJR:dc

Enclosure

APPENDIX W

SENDER: *COMPLETE THIS SECTION*
■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front of space permits.
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2. Article Number (*Transfer from service label*) 7006 3450 0001 7482 1833

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599 Lexington Avenue

New York, N.Y. 10022

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Supreme Court, U.S.
FILED
DEC 4 - 2009
OFFICE OF THE CLERK

No. 09-312

In The

Supreme Court of the United States

CLIFF GREENE,

Petitioner,

v.

HANOVER DIRECT, INC., et al.; WILLIAM B. WACHTEL, Chairman of the Board of Directors, and Chairman of the Nominating Committee; WAYNE P. GARTEN, Chief Executive Officer, President and Director; STUART FELDMAN, Chairman of the Executive Committee and a member of the Compensation Committee and Director,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A REHEARING

CLIFF GREENE, *Pro Se*
1333 President Street
Brooklyn, New York 11213
(718) 493-7028

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Federal Rule of Civil Procedure

6(b).....*passim*
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Comes now Petitioner Cliff Greene, Pro Se, and submits the following compelling reasons in support of his Petition for a Rehearing.

THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

1. The cause of action upon which the United States District Court for the Southern District of New York based its final rulings, granting Defendants-Appellees' motion to dismiss the complaint, and same, affirmed by *United States Court of Appeals for the Second* Circuit, are not only contrary to the cause of action upon which the case, the complaint, was brought to the District Court by Petitioner, but, has so far departed from the accepted and usual course of judicial proceedings, that this court should allow Petitioners' Petition for a Rehearing.

2. The accepted and usual course of judicial proceedings are to base final rulings or judgment on cause or causes of action brought to the court in the complaint by Petitioner and the allegations made therein. Therefore, since the judgment of the District Court and the affirmation of same by Second Circuit were not based on the complaint and allegations made therein by Petitioner, this Court should allow Petitioners' Petition for a Rehearing.

REASONS FOR ALLOWANCE OF PETITION FOR A REHEARING

1. Memorandum and Order dated New York 11-19-2007, date filed 11-21-2007, same, granted Defendants' Motion to Dismiss the Complaint in its Entirety with Prejudice, was not *repeat* was not based on the cause of action upon which the case was brought to the District Court by Petitioner.

2. Memorandum and Order dated New York, 4-17-2007, accurately states the cause of action and allegations in the complaint, upon same was brought to the District Court. *See* this memorandum and order for affirmation; same, in the Petition for Writ of Certiorari.

3. Memorandum and Order dated New York, 4-17-2007, and Memorandum and Order dated New York, 11-19-2007, date filed 11-21-2007, are allegedly signed by the same judge, the Presiding Judge Naomi Reice Buchwald. That being the case, why then are the causes of action upon which the case was brought to the District Court different?

4. These too are grounds or reasons for allowance of the Petition for a Rehearing.

STATEMENT

The Court of Appeals for the Second Circuit affirmed the Judgment of the District Court in a Summary Order dated and filed on 6-5-2009. The Court ruled that "the district court did not abuse its

discretion in granting the extension" when "the district court granted Appellees a brief extension of time to file a motion to dismiss after Appellees had difficulty reaching Greene to arrange for a pre-motion conference." Second Circuit, "review a district court's grant of an extension of time pursuant to Fed.R.Civ.P. 6(b) for abuse of discretion." *See Sanozky v. Int'l Ass'n of Machinists & Aerospace Workers,* 415 F.3d 279, 283-84 (2dCir.2005).

The Second Circuit relied upon the above-mentioned case law ("*Sanozky*"), to support its rulings. "The District Court did not abuse its discretion in granting the extension."

Petitioner researched *Sanozky* and found Second Circuit rulings, same, as follows: "Fed.R.Civ.P. 6(b) (District Court may, in its *284 discretion, grant an extension of time to perform an act *under the rules*").

Respondents' pre-motion conference, submitted to the District Court in a memo endorsed letter, dated 4-26-2007, hand delivered to the presiding judge's chambers on 4-27-2007, same, "defendants would like to move the Court for an Order dismissing the Complaint pursuant to Fed.R.Civ.P. 12(b)(6) and Fed.R.Civ.P. 9(b)." "In addition, we respectfully request the Court to extend Defendants' time to respond to the Complaint to a date set by the Court at the requested conference."

Petitioner respectfully asks this Court whether Respondents' pre-motion conference, submitted to the

District Court in a memo endorsed letter dated 4-26-2007, "so ordered" 4-30-07, "defendants may have until 5-15-2007, to answer or otherwise move. No pre-motion conference required," qualified as being a Rule under 6(b)? IF NOT, then, the Court must conclude that this is reason for allowance of the Petition for a Rehearing.

STATEMENT OF THE CASE

1. On 3-13-2007, Petitioner filed an amended complaint with the District Court's Pro Se Clerk. The clerk, issued four summons, same were to be served upon each of the four Defendants. After having been served, Petitioner was required to return the originals with a certificate of service to the clerk's office. On 3-14-2007, Defendants were properly served, and, on 3-15-2007, the certificates of service were filed with the clerk's office.

2. The District Court, made it crystal clear to the Defendants on the face of the summons, what the consequences would be if Defendants failed to answer the complaint *prior* to expiration of time set forth on the face of the summons.

3. At midnight, on 4-3-2007, Defendants fell into default. When the court learned that the Defendants had not answered the amended complaint prior to expiration of time set forth on face of summons, the court breached its promise, did an about face, and, with jet like speed, illegally extended time to Defendants to answer or otherwise move. The

extension *was illegal* because neither Defendants nor the court were in compliance with Fed.R.Civ.P. 6(b), and the applicable Rules thereunder, 6(b)(1), 6(b)(2). Fed.R.Civ.P. 6(b)(1) grants a court discretion to enlarge a time period for cause shown if the request comes before the expiration of the initial period or an extension of that period.

4. Fed.R.Civ.P. 6(b)(2), permits enlargement, *upon motion*, after the specified period expires. The applicant must show cause and excusable neglect.

5. Defendants, tardy litigants, have failed to answer the amended complaint prior to expiration of time period set forth on face of amended summons, were required to petition the court, to file a motion in this case a pre-motion conference, Show Cause and Excusable Neglect, same, pursuant to provisions provided for in Fed.R.Civ.P. 6(b)(2). Instead Defendants' pre-motion conference was pursuant to Fed.R.Civ.P. 12(b)(6), and 9(b).

6. Petitioner, contends that the District Court, *abused* its discretion when it extended time to Defendants to answer or otherwise move. Knowingly, that defendants, tardy litigants, have failed to answer an amended complaint prior to expiration of time period set forth on face of amended summons, were required to petition the court, to move the court pursuant to Fed.R.Civ.P. 6(b).

7. Defendants, in a memo endorsed letter dated 4-26-2007, hand delivered to the judge's chambers on 4-27-2007, requested an extension of time to answer the

complaint. The court, on 4-30-2007, "so ordered" that "the defendants may have until 5-15-2007, to answer or otherwise move. No pre-motion conference required."

8. Petitioner, contends that the granted extension of time, mentioned herein above in #6, *was an abuse of discretion* and, a violation of Fed.R.Civ.P. 6(b) and 6(b)(2).

9. Petitioner brought the herein-captioned case to the District Court (S.D.N.Y.) on allegations that allege Defendants engaged in a fraudulent scheme to defraud its shareholders by allegedly, knowingly, and intentionally conspiring to manipulate Hanover Direct, Inc. (HDI) annual consolidated financial statements for personal gains by using unlawful accounting practices and artificially inflating its annual revenues so as to maximize senior managers' yearend bonuses for those that held performance contractual agreements, expressed or implied.

REASONS FOR ALLOWANCE OF A REHEARING

1. Memorandum and Order dated New York 11-19-2007, date filed 11-21-2007 same, granted Defendants' Motion to Dismiss the Complaint in its entirety with prejudice, was not *repeat*, was not based on the Cause of Action upon which the case was brought to the District Court by Petitioner.

2. The District Court, committed reversible error and abused its discretion when it extended time to

Defendants upon a request for same, in a pre-motion conference memo endorsed letter dated 4-26-2007, "so ordered," dated 4-30-07, "defendants may have until 5-15-2007, to answer or otherwise move. No pre-motion conference required." Knowingly, that Fed.R.Civ.P. 6(b)(2), governs extension of time to a tardy litigant who has failed to answer the amended complaint *prior* to expiration of time period set forth on face of amended summons by the court.

A. RULE 6(b)(2) PERMITS ENLARGEMENT *UPON MOTION. SEE* CIVIL PROCEDURE RELEASE #9, 12/89. App. 1-4.

1. Rule 6(b)(2) permits enlargement, *upon motion*, after the specified period expires. The applicant must show cause and excusable neglect. The courts passing on Rule 6(b)(2) motions have demonstrated varying attitudes toward failure to act timely. Some courts have been flexible: *See* App. 3, Rule 6(b)(2).

B. OTHER COURTS HAVE BEEN LESS DISPOSED TO GRANT RELIEF TO A TARDY LITIGANT.

1. *Other courts* have been less disposed to grant relief to a tardy litigant: *Supermarkets Gen. Corp. v. Grinnell Corp.*, 490 F.2d 1183, 1186 (2dCir.1974), *aff'd* 59 F.R.D. 512 (S.D.N.Y.1973). *See* App. 3, Rule 6(b)(2).

2. The Petition for a Rehearing should be allowed on the grounds that the case law upon which the Second

Circuit relied in its affirmation of the District Court's extension of time to Defendants, (*Sanozky v. Int'l Ass'n of Machinists & Aerospace Workers*, 415 F.3d 279 (2dCir.2005)), actually supports Petitioner's position; that the District Court and the Defendants, *were not in compliance with the rules under Fed.R.Civ.P. 6(b)*, namely 6(b)(1), 6(b)(2).

In *Sanozky*, the Second Circuit ruled as follows: "Fed.R.Civ.P. 6(b) (District Court may, in its *284 discretion, grant an extension of time to perform an act under *the rules*"). What are the applicable rules in the herein-captioned case? They are Rules 6(b)(1) and 6(b)(2). Did Defendants submit their pre-motion conference, under the provisions set forth in Rule 6(b)(2) Show Cause and Excusable Neglect? *The answer is no.* The District Court extended time to the Defendants to answer the amended complaint, *under grounds other than the provisions provided for under Fed.R.Civ.P. 6(b)(2).* Petitioner contends that the absence of pre-motion conference, by the Defendants, pursuant to the provisions provided for in Rule 6(b)(2); the District Court, the presiding judge, *does not have legal authority to extend time to Defendants* to answer the *amended complaint*.

3. Defendants, tardy litigants, have failed to answer the amended complaint prior to expiration of time period set forth on face of amended summons, were required to petition the court, to file a motion, in this case a pre-motion conference, to Show Cause and Excusable Neglect. If the District Court, the presiding judge, finds that the Show Cause was a good Show Cause for not answering the amended complaint prior

to expiration of time set forth on the face of the amended summons, and, that the excusable neglect was reasonable, absent of bad faith on the part of movant (Defendants), or undue prejudice to parties to the action *and most of all, that it was no fault of the Defendants, as to why the amended complaint was not answered prior to expiration of time period set forth on face of amended summons.* As it stands, Defendants did not file its pre-motion conference pursuant to Rule 6(b)(2), instead, Defendants' pre-motion conference was pursuant to Fed.R.Civ.P. 12(b)(6), 9(b).

4. The District Court, "so ordered" 4-30-07, "defendants may have until 5-15-2007, to answer or otherwise move. No pre-motion conference required." Petitioner contends that this extension of time was contrary to the provisions provided for in Fed.R.Civ.P. 6(b)(2). Therefore, *an abuse of judicial discretion. See Supermarkets Gen. Corp. v. Grinnell Corp.*, 490 F.2d 1183, 1186 (2dCir.1974), *aff'd* 59 F.R.D. 512, 513-15 (S.D.N.Y.1973). *Also see* App. 3, Rule 6(b)(2).

5. *The Petition for a Rehearing should be allowed, when this Court, applies facts given herein, to the law.*

6. *Further,* as far back as 5-11-2007, eleven days after District Court extended time to Defendants, in a "so ordered" ruling dated 4-30-07, Petitioner filed an application with the court respectfully requesting that the court reconsider its extension of time to Defendants to answer the amended complaint. *See* as follows:

1. Request for district court, to reconsider its extension of time to defendants to answer amended complaint on grounds that defendants were not in compliance with Fed.R.Civ. P.6(b)(2), application denied.

7. To conclude -1- under reasons for allowance of the Petition for a Rehearing, Petitioner contends that the illegal extension of time to Defendants, by the District Court, and the affirmation of same by Second Circuit, resulted in Petitioner being prejudiced, deprived of the relief sought in the amended complaint. -2- Fed.R.Civ.P. 55(b)(2), (default), and -3- The District Court's promise on the face of the amended summons, "An answer to the complaint which is herewith served upon you, within *20* days after service of this summons upon you exclusive of the day of service. *If you fail to do so judgment by default will be taken against you for the relief, demanded in the complaint.*"

8. The Second Circuit committed reversible error when it affirmed District Court's extension of time to Defendants to answer or otherwise move.

C. *SANOZKY* COMPELLINGLY SUPPORTS PETITIONER'S POSITION, AND NOT THE SECOND CIRCUIT'S.

1. Petitioner finds that *Sanozky*, compellingly supports Petitioner's position. That the Defendants failed to seek extension *under the Rules of 6(b), which are Fed.R.Civ.P. 6(b)(1), 6(b)(2).* Therefore, the Petition

for a Rehearing should be allowed. Petitioner is simply respectfully asking this Court to apply the facts given hereinabove, to the *law. Re: 6(b), and the applicable Rules thereunder, 6(b)(1), 6(b)(2).*

D. RULE 6(b)(1) GRANTS A COURT DISCRETION TO ENLARGE A TIME PERIOD FOR CAUSE SHOWN IF THE REQUEST COMES BEFORE THE EXPIRATION OF THE INITIAL PERIOD OR AN EXTENSION OF THAT PERIOD.

1. Had Defendants sought from Petitioner a stipulation for an extension of time to answer the amended complaint *prior to expiration of time period set forth on the face of the amended summons, same would have been granted.* However, had Petitioner refused the request for extension, Defendants could have sought the extension with request for same via affidavit to the District Court.

2. Rule 6(b)(1) grants a court discretion to enlarge a time period *for Cause Shown* if the request comes *before* the expiration of the initial period or extension of that period. *See* App. 1-4 for affirm. Defendants did not seek from the court, an extension of time to answer the complaint until 4-27-2007. Defendants were properly served on *3-14-2007.* And at midnight, on *4-3-2007, fell into default.* Thereafter, they were required to comply with the provisions provided for in Rule 6(b)(2) Show Cause and Excusable Neglect. Instead of making its pre-motion conference as provided for in 6(b)(2), Defendants pre-motion conference

was made in a memo endorsed letter dated 4-26-2007, hand delivered to judge's chambers on 4-27-2007. Same, to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6) and 9(b). Defendants said to the court: "We respectfully request the court extend Defendants' time to respond to the complaint to a date set by the court at the requested conference."

3. The Court acquiesced in a "so ordered" ruling dated 4-30-07. "Defendants may have until 5-15-2007, to answer or otherwise move. No pre-motion conference required." *This was without a doubt, an abuse of discretion.* Petitioner contends that Second Circuit committed reversible error when it affirmed the District Court's extension of time to answer the amended complaint.

4. Petitioner visited the District Court's Pro Se Clerk on 4-16-2007, same, to find out whether Defendants had answered the amended complaint. The answer was no. Petitioner alleges that the Clerk's Office tipped off Defendants that they were in default. Hence, the Defendants' letter dated 4-17-2007 seeking stipulation for extension of time to answer the amended complaint. Same, referred to by Second Circuit, in its Summary Judgment, p.2 lines 38-42, as follows: "The district court granted appellees a brief extension of time to file a motion to dismiss after appellees had difficulty reaching Greene to arrange for a pre-motion conference." "The district court did not abuse its discretion in granting the extension." Petitioner contends that as brief as the extension may have been, same, must be granted

under Fed.R.Civ.P 6(b). The applicable Rules are 6(b)(1), 6(b)(2). Therefore, since the brief extension mentioned herein above, was not *repeat* was not under *the rules*, the District Court did indeed abuse its discretion in granting the extension. *See Sanozky.*

5. To conclude Number Two under Reasons for Allowance of the Petition for a Rehearing, Petitioner respectfully asks this Court whether Respondents' pre-motion conference, submitted to the District Court in memo endorsed letter dated 4-26-2007, "so order" 4-30-07, "defendants may have until May 15, 2007, to answer or otherwise move. No pre-motion conference required," *qualified as being a Rule under 6(b)*? If not, then *this Court must conclude that this is indeed a compelling reason to allow the Petition for a Rehearing.*

6. Petitioner, further, concludes that after Defendants failed to answer the amended complaint prior to expiration of time set forth on the face of the amended summons, Petitioner has no say in the matter of granting Defendants stipulation extending time to answer the amended complaint. It is left entirely up to the presiding judge and the provisions provided for in Fed.R.Civ.P. 6(b)(2). The Defendants, tardy litigants, should have filed their pre-motion conference Show Cause and Excusable Neglect, and if the Court finds that the Cause Shown was a good cause, and, the Excusable Neglect, demonstrated good faith by Defendants, also, *that there was a reasonable basis for not complying within the specified period set forth on the face of the amended*

summons, then, and only then that the District Court, the presiding judge, has the legal authority to extend time to Defendants to answer the complaint. Petitioner had no hand in the matter of the extension. So why were Defendants trying to reach Petitioner to arrange for a pre-motion conference? *See* p.2 lines 34-42 of Summary Order filed 5-5-2009. *Petitioner contends that the District Court did indeed abuse its discretion in granting the extension.* And, the case law that Second Circuit relied upon in its affirmation of the District Court's rulings *actually supported Plaintiff, the Petitioner.*

COMPELLING REASONS FOR ALLOWANCE OF THE PETITION FOR A REHEARING

1. Rehearing is warranted to resolve a conflict concerning the District Court's Memorandum and Order dated 4-17-2007, and Memorandum and Order dated 11-19-2007, and filed 11-21-2007. Re: Grounds upon which the case was brought to the Court.

2. Rehearing is warranted to determine which of the two Memorandum and Order the court should have based its final order, dismissing the complaint.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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(718) 493-7028

CERTIFICATION OF COUNSEL

I hereby certify that the foregoing petition is restricted to the grounds specified in Rule 44 and is presented in good faith and not for delay.

_____

Cliff Greene

Rule 6

Time

CIVIL PROCEDURE **Rule 6**

C. Wright & A. Miller, Federal Practice and Procedure: Civil XXX-III-LXVII (1987). There is current disagreement on the issue of the applicability of Rule 6(a) to federal statutes of limitation. Compare *Lawson v. Conyers, Chrysler, Plymouth & Dodge Trucks, Inc.*, 600 F.2d 465, 466 & n.1 (5th Cir. 1979) ("This court has consistently used Rule 6(a)'s method for computing federal statutory time limitations.") [and] *Wirtz v. Peninsula Shipbuilders Ass'n*, 382 F.2d 237, 238-40 (4th Cir. 1967) with *Joint Council Dining Car Employees, Local 370 v. Delaware, L. & W. R.R.*, 157 F.2d 417, 420 (2d Cir. 1946) ("Rule 6(a) is a rule of procedure relating to acts done or proceedings had after the commencement of action. . . . It is not intended to modify and change existing statutes of limitation."). Because of the Supreme Court's recent decision in *Walker v. Armco Steel Corp.*, 100 S.Ct. 1978 (1980), any argument seems foreclosed for the application of Rule 6(a) to a state statute of limitations in a federal diversity state claim action. State methods of computing state statute of limitations time periods must be followed by the federal court. See *Alonzo v. ACF Property Management, Inc.*, 643 F.2d 578, 581 (9th Cir. 1981) ("Computation of time provisions, like the commencement of action provisions involved in *Ragan* and *Armco Steel*, are 'an integral part of the statute of limitations.' The computation of time

provisions reflect a strong policy in favor of recognition of certain state holidays on specified days. As a result, we find that *Ragan* and *Armco Steel* require the district court to use the state rather than the federal computation of time statute.").

The 1985 amendment to Rule 6(a), effective August 1, 1985, makes the following changes: (1) If the last day of the time period is a day when the clerk's office is inaccessible because of weather conditions or other events, then that last day is excluded from the time period computation; (2) In place of the former period of less than 7 days, intermediate Saturdays, Sundays, and legal holidays are excluded from the time computation when the period allowed for response is less than *11* days; (3) The Birthday of Martin Luther King, Jr. (the third Monday of January) is now a legal holiday that must be acknowledged in the computation of time periods governed by Rule 6(a).

Rule 6(b)(1) grants a court discretion to enlarge a time period for cause shown if the request comes before the expiration of the initial period or an extension of that period. Although this subdivision does not require notice to an opponent, local court rules may reflect a reluctance to enlarge without a noticed motion. E.g., "The court may, in its discretion, grant an initial extension *ex parte* upon the affidavit of counsel that a stipulation extending time cannot reasonably be obtained, explaining the reasons why such stipulation cannot be obtained and the reasons why the extension is necessary." E.D. Cal. R. 142(b)

(1989). The meaning of "cause shown" is without significant case definition. See generally *Poe v. Cristina Copper Mines, Inc.*, 15 F.R.D. 85, 86-88 (D. Del. 1953).

Rule 6(b)(2) permits enlargement, upon motion, after the specified period expires. The applicant must show cause and excusable neglect. The courts passing on Rule 6(b)(2) motions have demonstrated varying attitudes toward failure to act timely. Some courts have been flexible: *United States v. Miller Bros. Constr. Co.*, 505 F.2d 1031, 1035 (10th Cir. 1974) ("A discretionary extension should be liberally granted absent a showing of bad faith on the part of the movant . . . or undue prejudice to other parties. . . ."). *Coady v. Aguadilla Terminal, Inc.*, 456 F.2d 677, 678-79 (1st Cir. 1972). *Anderson v. Stanco Sports Library, Inc.*, 52 F.R.D. 108, 109-110 (D.S.C. 1971). Other courts have been less disposed to grant relief to a tardy litigant: *Supermarkets Gen. Corp. v. Grinnell Corp.*, 490 F.2d 1183, 1186 (2d Cir. 1974), *aff'g* 59 F.R.D. 512, 513-15 (S.D.N.Y. 1973). *Graham v. Pennsylvania R.R.*, 342 F.2d 914, 915-16 (D.C. Cir. 1964), *cert. denied*, 381 U.S. 904 (1965). *Driver v. Gindy Mfg. Corp.*, 24 F.R.D. 473, 474-75 (E.D.Pa. 1959). Regardless of this apparent difference in approach to Rule 6(b)(2), the outcome probably depends most on the type of proceeding not timely met.

Excepted from enlargement discretion in Rule 6(b), are the times for taking action under Rules 50(b), 52(b), 59(b),(d), and (e), and 60(b). This exception is strictly construed. See, e.g., *Hulson v. Atchison, T. & S. F. Ry.*, 289 F.2d 726 (7th Cir. 1961), *cert. denied*,

368 U.S. 835 (1961). The 1983 amendment to Rule 6(b)(2) adds two additional Rules that are excepted from enlargement discretion: Rule 50(c)(2) and Rule 74(a).

Rule 6(c). In 1963, Congress enacted a law, Pub. L. No. 88-139, 77 Stat. 437 (codified at 28 U.S.C. § 138 (1976)) which ended the observance of district court formal terms. This law made Rule 6(c) irrelevant and it is rescinded, effective July 1, 1966.

Rule 6(d) applies to written and noticed motions. The motion and its notice must be served five days prior to hearing unless a Rule or the court otherwise provides for cause shown by *ex parte* application.